U. S. Sup. Ct.
Brief of Stiles for P. C.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

Filed January 9, 1897.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 491.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
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HENRY C. KING, *Plaintiff in Error*,

vs.

M. B. MULLINS, ALEXANDER McCLINTOCK AND JOHN McCLINTOCK, *Defendants in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

MAYNARD F. STILES, Counsel for Plaintiff in Error.

(16,257)

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ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

STATEMENT.

At rules held March 4th, 1895, in the office of the Clerk of the Circuit Court of the United States for the District of West Virginia, at Charleston, Henry C. King, plaintiff in error here, filed his declaration of ejectment (record, p. 1) against one Simon S. Altizer and sundry others, including these defendants in error, M. B. Mullins, Alexander McClintock and John McClintock, to recover possession of the land mentioned in said declaration, being the West Virginia portion of a tract of 500,000 acres of land granted to Robert Morris, June 23rd, 1795, by the Commonwealth of Virginia, lying at that time in Virginia and that portion of Kentucky then in dispute between said two States, a portion of said tract lying now in the District of West Virginia in the Counties of Logan, Mingo, Wyoming and McDowell, and the remainder in Kentucky and Virginia. On July 8th, 1895, an order was entered (p. 8) transferring the cause to Parkersburg, for trial, and on the 16th day of October, 1895,

came the said defendants, M. B. Mullins, Alexander McClintock and John McClintock, severed from the other defendants named in the declaration, entered their plea of not guilty, and the cause came on for trial as to said three defendants (p. 8), and continued on trial for thirty days, the jury disagreeing and being discharged (p. 9) November 15th, 1895.

On the 14th day of January, 1896, the cause came on again for trial as to said three defendants (p. 9), the Hon. Nathan Goff, Circuit Judge, presiding, and continued on trial until January 30th, 1896, when the jury, by direction of the Court, returned a verdict for defendants (p. 11), and on February 27th, 1896, judgment was entered for defendants (p. 12) and on the same day plaintiff tendered his bills of exceptions (pp. 12 to 31) which were allowed by the Court and filed.

On March 20th, 1896, plaintiff presented his bond and petition for writ of error from this Court (p. 32) with assignment of errors, and writ of error and citation were that day awarded (p. 36) and bond received, approved and filed (p. 35).

The record was filed and cause docketed in this Court, April 16th, 1896, and on Nov. 20th, 1896, stipulation for submission upon printed arguments was entered into by Counsel for the respective parties.

Upon the trial plaintiff offered in evidence a copy of the grant from Virginia to Robert Morris, certified from the Register of the Virginia Land Office, (p. 12), proved the location of said grant, proved that by sundry mesne, conveyances and legislative and judicial proceedings, offered in evidence, the title of said Robert Morris had become vested, in 1866, in Robert E. Randall, trustee appointed that year by the Courts of Virginia and West Virginia, and on the 29th day of June, 1886, was vested in John R. Read, appointed successor in trust to said Randall, by decrees of said Courts and by decree of the United States Circuit Court for the District of West Virginia, and that by virtue of sundry mesne, conveyances by said Read, trustee, David W. Armstrong and John V. LeMoyne, the title to said land had passed to plaintiff King, December 27, 1893. Plaintiff further proved that defendants were in possession, claiming title, at the time suit was brought and at the time of trial.

Plaintiff having shown a right to recover, defendants to defeat that right, sought to show an outstanding title in the State of West Virginia by the forfeiture of the title claimed by plaintiff, by reason of the alleged non-assessment of the land for tax-

es, and for that purpose offered in evidence a certificate of the State Auditor (p. 14), purporting to show that none of the persons under whom plaintiff claims title as above shown, and certain other persons mentioned in the certificate, who had been beneficiaries of the trust, had had the land entered on the land books of the counties in which the same is situated, or had paid taxes thereon, or had been charged with taxes on the land from the year 1883 to 1894; to the introduction of which certificate in evidence, plaintiff objected on the ground that the same was not the best evidence, or any evidence of forfeiture of the land claimed by plaintiff, or of any outstanding title, or of any fact material to the issue in said cause. To the admission of this certificate, plaintiff takes his Bill of Exceptions No. 1 (p. 12). Defendants next offered a certified copy of an order of the Wyoming County Circuit Court, appointing E. M. Senter, Commissioner of School Lands for that county (p. 13), and copy of his annual report for the year 1894 (p. 16), and copy of a similar order of the Circuit Court for Logan County, appointing U. B. Buskirk, Commissioner of School Lands for that county, (p. 18-19) and copy of his annual report for 1891 (p. 19), to be taken in connection with said certificate, to the introduction of which in evidence, plaintiff objected on the ground that they were not the best evidence or any evidence of forfeiture and were not made in conformity with law or authorized by law. They were admitted and read in evidence and plaintiff takes Bills of Exceptions No. 2 (p. 15) and No. 3 (p. 18). Lastly defendants offered copy of an order of said Logan County Circuit Court, directing a suit to be brought and prosecuted in the name of the State of West Virginia against all persons interested in the land mentioned in the report of Commissioner Buskirk for the sale of the said lands (p. 28). To the introduction of such order in evidence, plaintiff objected on the ground that it did not constitute a forfeiture and was not evidence of any forfeiture of plaintiff's land and was not made in any proceeding to which plaintiff or any one under whom he claimed was a party; that the same was not authorized by law and that the Court had no jurisdiction to pronounce or enter it. The objection was overruled and plaintiff took his Bill of Exceptions No. 4 (p. 28).

In rebuttal of said alleged forfeiture and outstanding title, and to show that no forfeiture existed or was claimed by the State of West Virginia, plaintiff offered and read in evidence a certificate of the said Auditor of West Virginia, that he had examined

the record books of forfeited lands returned and kept by him in his office as required by law, for said counties of Logan, Mingo, Wyoming and McDowell, from and including the year 1883 to date, October 30th, 1895, and that there did not appear upon said books the tract of land in question or any part of it or any land forfeited for any cause in the name of plaintiff or of any of the persons under whom he claims title as aforesaid; that there were no lands from any of said counties entered on said record of forfeited lands, for any of said years, in the name of any of said persons; and that the said land did not, nor did any part of it, appear, nor had any land been entered, in the name of plaintiff or any of said persons, upon the record books of lands delinquent for any cause, kept by him as required by law for said counties, for said years, (p. 30); and proved payment by Randall, trustee, under whom plaintiff claims, of all taxes charged and chargeable upon said land prior to and including the year 1883, and that he, plaintiff, was a purchaser of said land for valuable consideration without knowledge or notice of any alleged forfeiture thereof or outstanding title thereto in the State of West Virginia, or of any of the matter set out in the Auditors certificate offered in evidence by defendants, "except such notice as the land books and records duly kept" disclosed (bottom p. 30).

This closed the evidence, and at request of defendants and against plaintiff's objection, the court instructed the jury that the title to the land claimed by plaintiff was, prior to the date of the deed from LeMoyne to plaintiff, forfeited to and vested in the State of West Virginia, under the provisions of the constitution of said State, and was so forfeited when this suit was instituted, and that plaintiff therefore took and had no title to said land; and directed the jury to render a verdict in favor of defendants (p. 31) which was done and judgment entered accordingly. Plaintiff objected to said instruction on the ground that the provisions of the Constitution of the State of West Virginia for the forfeiture of land are repugnant to and in conflict with the Constitution of the United States, viz.: Act XIV, Sec. 1 of the Amendments thereto, and other paramount and controling provisions of the Constitution of said State of West Virginia, viz.: Art. III, Secs. 4, 5, 9, 10, 20 and Art. V, Sec. 1; and upon the further ground that if there were a forfeiture of said land to the State, it could not be set up against plaintiff in said action, who was a purchaser for value without knowledge or notice of such forfeiture or outstanding title.

Plaintiff's objection to the instructions of the Court is noted in Bill of Exceptions No. 5 (p. 29). All said proceeding appears more fully in plaintiff's Bills of Exceptions Nos. 1 to 5, pages 12 to 31 of the record.

The final questions that are presented by the record are:

1st. Whether or not the provision in the Constitution of West Virginia for the forfeiture of land for non-assessment for five consecutive years, since the year 1869, is in conflict with the Constitution of the United States, or are otherwise invalid; and if not,

2nd. Whether a forfeiture can be enquired of and established collaterally as in the trial of this action of ejectment, there having been no previous determination on behalf of the State or otherwise; and if so,

3rd. Whether a forfeiture of the land claimed by plaintiff in this action, has been proven by proper evidence; and,

4th. Whether, such forfeiture existing and being proven, it can avail defendants and defeat the title of a subsequent purchaser for value and without knowledge or notice of the forfeiture.

Numerous other questions arose upon the trial, but were eliminated by the final action of the Court and do not come up with this record.

SPECIFICATION OF ERRORS.

Plaintiff in Error maintains that said judgment of the said Circuit Court is erroneous and against the just rights of plaintiff in said cause, this plaintiff in error, and specifies the following errors committed by said Circuit Court to the prejudice of plaintiff, upon the trial of said action in said Court.

First:—The said Court erred in admitting in evidence to the jury on behalf of defendants and against the objection of plaintiff, a certificate of the Auditor of the State of West Virginia purporting or tending to show that the plaintiff, or those under whom he claims title to the land in controversy, had not had the same entered upon the land books of the counties wherein the same is situated, or paid taxes thereon, or been charged on said land books with state taxes on said land, since the year 1883; for the purpose of defeating the title shown by plaintiff to said land, by showing that the same was forfeited to and vested in the said State of West Virginia; because the facts stated in said

certificate, if they be facts, could not operate to divest plaintiff or those under whom he claims, of title to said land or work any forfeiture thereof, and because said certificate is no proof or evidence of such divesture or forfeiture, and is not competent to be offered in evidence of forfeiture, or of the matters contained in said certificate.

Second:—The said Court erred in admitting in evidence to the jury on behalf of defendants and against plaintiff's objection, for the purpose of showing the forfeiture and divesture of plaintiff's title, copies of an order of the Circuit Court of West Virginia for the County of Wyoming, appointing E. M. Senter commissioner of school lands for said county, and the report of said Commissioner purporting to be a report of the forfeited lands of his county; said report being ineffectual to constitute and incompetent to prove and not proving and not being the best evidence nor any evidenee of forfeiture or divesture of the title to said land.

Third:—The said Court erred in like manner in admitting in evidence to the jury, on behalf of defendants and against the objection of plaintiff, copies of a like order of the Circuit Court of West Virginia for the County of Logan, appointing U. B. Buskirk commissioner of school lands for said county, and the like report of said commissioner purporting to be a report of the forfeited lands in his county.

Fourth:—The Court erred in admitting in evidence to the jury,on behalf of defendants and against the objection of plaintiff, a copy of an order of the said circuit court for Logan County, directing suit to be brought and prosecuted in the name of the State of West Virginia, to sell the lands mentioned in the said report of said commissioner of school lands for Logan county, it not appearing that said lands were ever sold or were liable to be sold, or that any suit was ever brought for that purpose, and the said order being not the best nor any evidence that plaintiff's title to the land in controversy was forfeited or divested out of him or out of any person under whom he claims, and said order not being made in any suit or proceeding in which plaintiff or any person under whom he claims was a party, and the said court having no jurisdiction or authority to enter the said order.

Fifth:—The said Court erred in admitting in evidence to the jury, against plaintiff's objection, all or any of the said certificates, orders and reports offered by defendants for the purpose of establishing or enforcing a forfeiture to the State, of the title

claimed by plaintiff, because it is not competent to establish or enforce a forfeiture in a collateral suit or action like the present one.

Sixth:—The Court erred in instructing the jury on behalf of defendants and against the objection of plaintiff, "that the title to the land claimed by plaintiff, granted to one Robert Morris by the Commonwealth of Virginia by patent dated June 23rd, 1795, was (prior to the date of the deed made by John V. LeMoyne to Henry C. King, under which plaintiff now claims), under the provisions of the Constitution of the State of West Virginia, forfeited to and vested in said State, and was so forfeited at the time this suit was instituted, and that therefore the plaintiff took and has no title to the said land;" because the said provisions of the Constitution relating to forfeiture and attempting and purporting to forfeit and divest the title to land out of the owner and vest the same in the State or in some other person, when such owner shall not have been charged with state taxes on said land for any five successive years since the year 1869, are wanting in due process of law and are in conflict with the Constitution of the United States, viz.: with Article I, sec. X, 1 thereof and Articles VIII and XIV, section 1, of the Amendments thereto, and are also in conflict with, and are repugnant to, paramount and controling provisions of the State Constitution, viz.: Article I, section 3; Article III, sections 4, 5, 9, 10, and Article V, section 1, and are therefore null and void.

Seventh: The said Court erred in instructing the jury, against plaintiff's objection, that by reason of forfeiture, "plaintiff took and had no title to said land," because there was, and could be, no forfeiture thereof, and there was no evidence of any forfeiture, and it being shown and proven by the certificate of the Auditor of West Virginia, that said land did not appear, and had not been entered, upon the record books of "lands forfeited for any cause" to the State, kept by him in his office, as required by law, from a time long prior to the pretended forfeiture down to a time subsequent to the bringing of said suit; and it being further proven that plaintiff was a purchaser of said land for valuable consideration, after the alleged forfeiture and without knowledge or notice of any alleged or pretended forfeiture, or of any of the matters upon which defendants claim that a forfeiture has occurred.

Eighth: The said Court erred in instructing the jury on account of alleged forfeiture of the title to the land claimed by

plaintiff, to render their verdict in favor of defendants; because no such forfeiture was a lawful defense to plaintiff's suit and title, plaintiff being an innocent purchaser and owner of said land.

Ninth: The said Court erred in instructing the jury that the title claimed by plaintiff to said land was or had been forfeited, because said title was an absolute, unconditional, fee simple title and was not capable or susceptible of being forfeited.

Tenth: The said Court erred in instructing the jury, upon the evidence offered in this cause, that a forfeiture had occurred whereby the plaintiff or any one under whom he claims was divested of his title to said land, and in directing the jury to find a verdict for the defendants, because upon the evidence, under the Constitution, there was nothing to warrant the jury in finding such verdict, or the Court in giving such direction; and because plaintiff 's title to said land is derived under the laws of Virginia, and by the provision of Art. XIII, sec. 1 of the Constitution of West Virginia, is to be determined by the laws in force in the state of Virginia prior to the adoption of said Constitution, at which time there was no law in Virginia for the forfeiture of land.

Eleventh: The said Court erred in instructing the jury to find their verdict for the defendants, the plaintiff having shown a right to recover and the defendants having failed to make out any defense.

Twelfth: The said Court erred in causing judgment to be entered for defendants upon said verdict.

Points of Law and Fact.

ARGUMENT.

Upon the trial plaintiff established title in himself and ouster by defendants (p. 12-13-14) and his consequent right to recover, and was entitled to a verdict and judgment, unless it was fully proven by legal and competent evidence, properly admitted, that the title he claimed was legally and absolutely forfeited and divested out of his predecessor in title, under whom he claimed, at the time of his purchase, and remained divested, and that, at the time of his purchase of the land, plaintiff had constructive notice of such forfeiture and divesture, from "the land books and records duly kept," it being conceded by the court (p. 30) that he had no other notice, and that, but for such notice, if any,

he was an innocent purchaser. The defense offered by defendants was, that the title was forfeited before suit was brought and before plaintiff's purchase.

Plaintiff in error contends that said title was not forfeited at the time of his purchase nor since; that the documents offered by defendants to prove forfeiture were incompetent for the purpose and were improperly admitted in evidence; that they do not prove or tend to prove a divestiture or forfeiture of the title; that plaintiff is an innocent purchaser, and that such forfeiture, if existing and proven, could not avail defendants against plaintiff; that a forfeiture cannot be established collaterally as here attempted; and that the provisions of the State Constitution upon which defendants and the court below based the claim of forfeiture are utterly invalid and void.

In the foregoing Specification of Errors, I have followed the order in which the alleged errors occured, but in this discussion I shall, for convenience, depart from that order.

The provisions of the Constitution of the State of West Virginia for the so called forfeiture of land, under which the tract of land in controversy is charged to be forfeited, and the only provision for forfeiture of any kind in the Constitution, are embraced in the following:

ARTICLE XIII.

LAND TITLES.

1. All private rights and interests in lands in this State derived from or under the laws of the State of Virginia, and from or under the constitution and laws of this State prior to the time this constitution goes into operation, shall remain valid and secure and shall be determined by the laws in force in Virginia, prior to the formation of this State, and by the constitution and laws in force in this State prior to the time this constitution goes into effect.

2. No entry by warrant on land in this State shall hereafter be made.

3. All title to lands in this State heretofore forfeited, or treated as forfeited, waste and unappropriated, or escheated to the State of Virginia, or this State, or purchased by either of said States at sales made for the non-payment of taxes and become irredeemable, or hereafter forfeited, or treated as forfeited, or escheated to this State, or purchased by it and become irredeemable, not redeemed, released or otherwise disposed of, vested and remaining in this State, shall be, and is hereby transferred to, and vested in any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees,) for so much thereof as such person has, or shall have had actual continuous possession of, under color or claim of title for ten years, and who, or those under whom he claims, shall have paid the State taxes thereon for any five years during

such possession; or if there be no such person, then to any person (other than those for whose default the same may have been forfeited, or returned delinquent, their heirs or devisees,) for so much of said land as such person shall have title or claim to, regularly derived, mediately or immediately from, or under a grant from the Commonwealth of Virginia, or this State, not forfeited, which but for the title forfeited would be valid, and who, or those under whom he claims has, or shall have paid all State taxes charged or chargeable thereon for five successive years, after the year 1865, or from the date of the grant, if it shall have issued since that year; or if there be no such person, as aforesaid, then to any person (other than those for whose default the same may have been forfeited, or returned delinquent, their heirs or devisees,) for so much of said land as such person shall have had claim to and actual continuous possession of, under color of title for any five successive years after the year 1865, and have paid all State taxes charged or chargeable thereon for said period.

4. All lands in this State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the State of Virginia, or this State, or purchased by either and become irredeemable, not redeemed, released, transferred or otherwise disposed of, the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall by proceedings in the circuit court of the county in which the lands, or a part thereof, are situated, be sold to the highest bidder.

5. The former owner of any such land, shall be entitled to receive the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this State, with interest at the rate of twelve per centum per annum, and the costs of the proceedings, if his claim be filed in the circuit court that decrees the sale, within two years thereafter.

6. It shal be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with State tax on said land, then by operation hereof, the land shall be forfeited and the title thereto vest in the State. But if, for any one or more of such five years, the owner shall have been charged with State tax on any part of the land, such part thereof shall not be forfeited for such cause. And any owner of land so forfeited, or of any interest therein at the time of the forfeiture thereof, who shall then be an infant, married woman, or insane person, may, until the expiration of three years after the removal of such disability, have the land, or such interest charged on such books, with all State and other taxes that shall be, and but for the forfeiture would be, chargeable on the land, or interest therein for the year 1863, and every year thereafter with interest at the rate of ten per centum per annum; and pay all taxes and interest thereon for all such years, and thereby redeem the land or interest therein: *Provided*, Such right to redeem shall in no case extend beyond twenty years from the time such land was forfeited.

The first constitution of West Virginia was adopted in the

year 1863 and the existing one in the year 1872, being in large measure a transcript from the former and from the Constitution of the United States, which, and the laws and treaties made in pursuance thereof, it declares in its first Article and paragraph, shall be the supreme law of the land.

The usual and legitimate subjects of constitutional concernment, principles of social organization and popular government, the establishment of the just relation between the State and the citizens in an age of enlightened civil liberty, are dealt with in both the earlier and the later constitution: but only in the latter and at the end thereof, as if inserted by stealth after the general business of the convention had been transacted and all but schemers had gone, appears this forfeiture provision, in irreconcilable conflict with the letter and spirit of many preceeding provisions, at war with the principles of civil government, and for rapacity, despotism and injustice unparalled in the history of legislation. It is submitted that wherever this provision conflicts, as will be hereafter shown, with provisions re-enacted from the former constitution, or adopted from the Constitution of the United States, or designed and enacted for the security of private rights, as well as where it conflicts with the Constitution of the United States, the latter provisions must prevail.

There having been at the trial, no discussion of the question as applied to the evidence offered by defendants, I am somewhat at a loss to discover upon what particular facts the Court predicated its instruction, as the commissioners of school lands report the land as forfeited for "Non entry," which the constitution does not make a cause or occasion for forfeiture, and the Auditor does not certify it to be forfeited at all, but certifies certain isolated facts, which would seem to justify the conclusion that counsel for defendants, if not under the same misapprehension as the commissioner of school lands, were at least uncertain as to the ground upon which they would base the claim of forfeiture.

The Forfeiture Provision Considered.

This forfeiture provision seems to be almost universally misapprehended and the forfeiture misascribed. Out of the desire apparently of those who defend it, to find some cause for the confiscation and to make it a penalty for some delinquency of the owner, the alleged forfeiture is commonly said to be "*because*

the owner has *failed to have* his land *entered* on the land books," or briefly, "for omission," for "non-entry," and less often "*for failure* of the owner to *have* himself charged with taxes."

There is nothing in the constitution to justify such expressions. The supposed forfeiture is not because the land is not entered on the land books, or because of anything the owner has done or failed to do. Mark the language: "When for any five successive years since the year 1869 the owner of any tract of land containing one thousand acres or more *shall not have been charged* on such books with State tax on said land, then by operation hereof the land shall be forfeited," &c. It is "When * * he shall not have been charged," and not because he has *failed* to do anything, and not *because* the land is not *entered* on the land books.

There is a provision that "it shall be the duty of every owner of land *to have it entered upon the land books* of the county in which it or a part of it is situated, *and to cause himself to be charged with the taxes thereon and pay the same*," but what of it? That provision is not coupled in law or grammatical sense with any thing preceeding or following, and it might as well appear in a different article. No consequence or effect of any sort is, in terms, attached to a failure to perform that duty, *and penalties are not to be raised by inference*. No penalty is charged to attach to the owner of *less* than 1000 acres, upon whom the duty is laid equally with the owner of a thousand acres or more.

The provision for forfeiting the land "when the owner shall not have been charged" makes no reference to, and has no grammatical or other connection with, the provision prescribing the duty of the land owner, and is in no manner whatever dependent upon it, for meaning or legal effect or validity. Strike out the "duty" provision and it would not change or affect the meaning or force of a single other syllable in the Article. The forfeiture is as purely a causeless and arbitrary capture of property as was ever made by a pirate upon the high seas. When the pirate falls afoul of the merchantman, the latter is, by operation thereof forfeited to and vested in the pirate.

But stretch the language, if you please, and make of it a forfeiture *because of the default of the owner*, it is then a self-enforcing penal statute, prescribing a most monstrous penalty for what, in the harshest view of it, is not a transgression of any law of God or man. From this standpoint I am quite willing it should be considered.

Under this Article a forfeiture may accrue in spite of any thing in the power of the land owner to prevent it. He is charged with the duty of having his land entered and assessed, and of paying the taxes, but how is he to do it? The law does not provide. He is not the owner or custodian of the land books and has no right to make the stroke of a pen therein, nor does the law make him his own assessor.

He may request the clerk of the county court, who is charged with the duty of making out the land books and entering the land thereon, (Code chap. XXIX, sec. 8) and the clerk may neglect or refuse, for what may seem to him cause, or without cause, to enter the land. Must the owner resort to the State's courts to compel the State's agent and officer to perform his duty? The time within which to have the land entered and assessed may be nearly expired when refusal is made, and may expire before application can be made to the court, and the taxes charged. If the land owner prosecutes the clerk for neglect of this duty, the State gets the penalty and still gets the land. If the land isn't entered the owner can't be charged with taxes, and if taxes are not charged he can't pay them. The refusal or omission of the officer to put the land on the books as requested, or to charge the taxes after it is put on, would entail all the other omissions and the forfeiture.

The land owner may even "have it entered upon the land books," he may have exacted and received from the assessor and from the county court and other officers, who are vested with the power and duty to fix the valuation and charge the taxes, the assurance that at the proper time and in the proper manner, the taxes will be duly charged, *still the taxes may not be charged*, and whether it be through the inadvertance or fraud of the officers, the land is, "by operation of law," eternally swept away from him and given to another who may perhaps be the very one who has fraudulently brought about the forfeiture, No one who has had experience in those counties of this State where a cloud of county officers, tax title buyers, land grabbers and their attorneys subsist largely upon these and kindred land frauds, will say that these things cannot happen. Worse than these, if possible, do happen.

But this is not all. The owner may prevail over the clerks, the assessor and the county court, by *mandamus*, if need be, but they deal with county and district taxes, and it is only when the owner "shall not have been charged on such books with *State*

tax on such land," that forfeiture results; and with taxation for State purposes, the Legislature, and it alone, is charged and entrusted by the Constitution (Art. X). It certainly is not going too far to say that when the law undertakes to make it the duty of a man to "cause himself to be charged" with State taxes, it requires of him what he can perform by no power of his own or by any that he can invoke, and yet if he is not so charged, his land becomes "by operation of law" the property of the State or a bystander.

Besides other powers of taxation conferred upon the Legislature by the State Constitution it is provided (Art. X, 5) as follows:

> The power of taxation of the Legislature shall extend to provisions for the payment of the State debt, and the interest thereon, the support of free schools, and the payment of the annual estimated expenses of the State; but whenever any deficiency in the revenue shall exist in any year, it shall, at the regular session thereof held next after the deficiency occurs, levy a tax for the ensuing year, sufficient with the other sources of income, to meet such deficiency, *as well as the estimated expenses of such year.*

If for any reason the Legislature, which has the sole power, should not find it necessary to levy any state taxes, or should not do so, for the requisite period, the land owners could not be charged with state taxes and the titles to every foot of land in the state would be forfeited and every owner divested in spite of anything he could do; and the only ones to come out of the operation with any land would be the State or trespassers and those who had been claiming under color of title. Such failure of the Legislature for one year would be fatal to the man whose land for the four preceding years had not, for any reason, been charged.

This may be said to state an extreme case, and I grant it, but it is a possible one, and legislative deadlocks, invasions and insurrections, have, before now, brought about extreme cases; and

> "The Constitutional validity of a law is to be tested not by what has been done under it but by what may by its authority be done." *Ullman* v. *Baltimore*, 73 Md. 576, quoting *Stuart* v. *Palmer*, 74 N. Y. 183.

And what may be done under this Article XIII? *Cui bono*, and to what purpose are four lines devoted to the causeless confiscation, and two pages to the prodigal distribution of the land of the citizen?

If the position of defendants in error is tenable, and the pro-

vision upon which they rely is valid, it is within the range of probable occurance that by mere operation of law, without sentence, judgment or decree; without condemnation, trial or accusation; without summons, notice or opportunity to defend; without compensation or indemnification, and without compunction or remorse, the State may wrest from one person, her citizen, it may be, guiltless of any crime or offense, or any violation of law human or divine, remiss in no public or private obligation, property of untold value that is lawfully his own, and assume it to herself, or gratuitously bestow it upon another person, a stranger perhaps, an alien enemy (until office found), a foreign corporation without a soul, or a felon in his cell, to whom or to which neither the state nor the one divested owes any debt or duty, and who has no better claim to such land than arises from the voluntary payment of a few dollars of void taxes under a bogus deed from one who never had or claimed any title, and in the hope of acquiring another man's land for nothing. And this may be, though the owner has "had his land entered on the land book" and who and those under whom he claims, have paid taxes for near a century, as in the present case, and where the owner has paid every cent of tax on the land, if it happen in any way that the land is charged in the name of another, his grantor for instance, and not in the name of the *owner*. To this extent has it been contended. It is easily perceivable that in case of forfeiture, the chance of the State receiving anything is infinitesimal, when one considers Sec. 3 of said Article and understands the system of overlapping surveys and successive regrants of the same land, that prevails in the state. But, whether the land goes to the state or to a private person, the "forfeiture," is a direct legislative transfer from one person to another.

PLAINTIFF'S LAND ENTERED ON LAND BOOKS.

The title to the land in question was in Robert E. Randall, trustee, from the time of his appointment as trustee by the court in 1866, until his successor Read was appointed in 1886.

All taxes charged and chargeable upon the land, up to and including the year 1883, had been paid by him (p. 30). That is undisputed and is shown by defendant's evidence as well as plaintiff 's. He had, then, discharged the duty of having the land entered on the land books and having it and himself "charged with the taxes thereon" and paying the same. He paid the taxes as long as they were charged, if, as defendants urge, none

were charged after 1883. If they had been charged, they would have been paid or the land would have been sold. If he stopped paying taxes after the *state authorities stopped charging them*, it does not seem remarkable. When he had his land entered for taxation, he did all he could do, all he was required to do, and all that was needful for him to do, to subject the land to taxation forever after, unless it should be sold to the state and never be redeemed. The owner is not required to have his land entered, &c., *toties quoties;* the law does not require it in terms or by just construction nor by any implication. No implication would be tolerated that might lead to a forfeiture. It was never contemplated that the land owner should, year by year, watch and see that the land is kept on the books, for ample provision is made by law for the officers of the state to attend to that, and when the owner has once given it in, they are required to look after it, and may reasonably be trusted by the owner and tax payer to do so, the direction to them being mandatory, and penalties provided for their failure.

The clerk of the county court makes up the land books from the land books of the previous year, and from other official records, reports and information, and has all the necessary data year after year, to keep them complete and accurate, and is required to correct errors and mistakes and enter and charge the land to the proper persons, "whether such correction be rendered necessary by the conveyance of such tract or lot by the person last charged or *otherwise*."

PROVISIONS FOR ASSESSMENT, &c., OF LANDS.

Some of the provisions of law relating to the matter of charging land with taxes are found in the following sections of said chapter XXIX of the Code of W. Va.

SEC. 8. The land books for every county shall be hereafter made out complete by the clerk of the county court of such county. In making said land books in each year he shall be governed as far as is proper, by the copy of the land books last made out in his county used by the assessor or assessors therein in making his or their assessments for the year, and the entries made therein by him or them, and returned to him as required by this chapter. But he shall correct errors and mistakes which he may discover in any such land books as to the names of persons properly chargeable with taxes on any tract or lot of land entered therein, and enter and charge the same with taxes thereon to the person or persons properly chargeable therewith, whether such correction be rendered necessary by the conveyance of such tract or lot by the person last charged with taxes

thereon or otherwise. He shall also correct all errors and mistakes he may find in such land books as to the distance and bearing of any tract of land from the court house or in the local description thereof, and all clerical errors of every sort which he may find therein. * * *

SEC. 9. The clerk of the county court, in making out the land books, shall correct any and every mistake he may discover in the original land books, and if any taxes have been omitted for a former year, he shall enter the same, with lawful interest thereon, for collection.

SEC. 10. When the assessor shall ascertain that there is any land in his district which has not been entered in the land book, or after being so entered, has from any cause been omitted for a period of less than five years, he shall make an entry thereof, and of the name of the owner, in the copy of the land book in his possession; and if there be no assessment of the same, shall proceed to make such assessment, to the best of his judgment, by reference to the assessed value of contiguous land similarly situated, and shall certify to the clerk of the county court all the taxes which should have been charged or collected, with lawful interest thereon; and the clerk of the county court shall be governed thereby in making out the land book. Any assessor failing to make such entry and deliver such certificate shall forfeit twenty dollars. And if the clerk of the county court make any such discovery, he shall enter the same in the land books and inform the proper assessor thereof, who shall assess the same as aforesaid, and certify his assessment to the clerk; and the clerk shall thereupon charge said real estate with taxes as aforesaid.

SEC. 14. If the owner of any tract or lot of land has derived title thereto by several conveyances from the same person, or from different persons, such tract or lot shall be entered and charged with taxes on the land books as a whole, and not in different parcels.

SEC. 15. The clerk of every circuit and municipal court shall annually in the month of April, make out lists of all judgments and decrees for the partition or recovery of lands which have been rendered by their respective courts, and have not been before reported to the proper officer, stating in such list the date of the judgment or decree in each case, the land recovered and by whom, or the land which was divided, and between whom and in what parcels.

SEC. 16. The clerk of every county court shall annually, in the same month, make out a list of all lands, if any, lying in another county absolutely devised by wills recorded in his office and not before reported to the proper officers, stating in such list the date of the will in each case, when admitted to record, the names of the devisor and devisee and a description of the land devised.

SEC. 17. Every list mentioned in the two preceding sections shall be delivered or transmitted by mail by the officer making it, to the clerk of the county court of the proper county.

SEC. 18. The Secretary of State shall annually, in the month of April, make out and forward to the clerk of the county court of each county, an abstract of all the grants issued by the State for land lying in such county not previously reported for assessment.

SEC. 20. Any party interested may procure at his own cost, a certified copy or statement of any deed, judgment, decree or grant, and deliver the same to the clerk of the county court, and the clerk may examine original deeds or the records of his or any other county to ascertain to whom any parcel of land is properly chargeable, or its description or quantity.

SEC. 23. Real estate purchased for the State at a sale for taxes, shall not be thereafter entered in the land books, but the Auditor shall keep a register thereof. But when the real estate so purchased appears by the Auditor's certificate to have been redeemed, the same shall be replaced in the land bood in the name of the former owner, his or her heirs or his or her grantee, and the Auditor shall, in the month of April in each year, certify to the clerk of the county court a list of such lands in his county as have been so redeemed within the preceding year. When real estate is sold to an individual for taxes, the clerk shall note in the land book the number of acres sold, and to whom, but shall continue the land upon said book in the name of the former owner until the purchaser obtains a deed therefor.

SEC. 24. The land specified in the lists, copies, deeds, records, abstracts and statements mentioned in the fourteenth, fifteenth, sixteenth, eighteenth and twentieth sections of this chapter, shall be transferred in the land books to the persons who appear thereby to be the owners thereof.

SEC. 26. When the owner dies intestate, his undivided real estate may be listed to his heirs without designating any of them by name until they shall have given notice to the clerk of the county court of the division of the same, the names of the several heirs, and the parcels allotted to each; and each heir shall be liable for the whole tax assessed upon such land while it is so listed; * * * Where the owner has devised the lands or a free hold estate therein absolutely, the clerk shall charge such land to the devisee. If, under the will, the land is to be sold, it shall be charged to the decedent's estate, and the assets in the hands of the personal representative shall be liable for the taxes until a sale and conveyance thereof be made.

SEC. 39. The assessor shall begin annually, on the first day of April, and proceed without delay to ascertain all the persons and property, real and personal, on that day, subject to taxation in his district. The taxes for each year upon real and personal property, shall be paid by those who are the owners thereof on that day, whether it be assessed to them or to others.

Sec. 77.—The assessor shall deliver to the clerk of the county court the land book used by him in making his assessments, together with the statements and corrections made therein, or appended thereto, and said clerk shall make three fair copies of the land book, and when the same are completed he shall, with such assistance as may be necessary, compare each copy thereof with the land book of the preceeding year, and when necessary, shall examine the records of his office and such transcripts, abstracts or statements from other officers as may be therein or in the possession of the assessor. He shall point out to the assessor, whose duty it shall be to attend at the office of said clerk when required, such errors, if any, as in his opinion exist in any of the books, and correct the same; but if the assessor does not concur as to the propriety of such correction, the matter shall be submitted to the prosecuting attorney for the county, and they shall conform to his decision.

Other sections provide for the verification of the land books and assessmeuts by the oaths and certificates of the clerk and assessor, and penalties for their failure to perform their duties.

Nothing is left to the land owner, nothing required of him, to

keep the land charged with taxes. By this statute, existing since 1863, every provision is made that ingenuity can suggest, to enable the officers who are charged with the entering of the land and the charging of taxes, to subject all lands and all owners thereof, to the payment of taxes. Every public record past and present, is put before them; every change in the record titled, by deed, devise, descent, decree or otherwise is certified to them. If there is no change in title, or until notice of change, the land must continue unchanged upon the land books, charged with taxes as formerly; if there is a change, the clerk and assessor are notified and the land entered and charged accordingly.

The Clerk of the County Court is the County Recorder—the Register of Deeds of his County. Every record affecting the title to land in his county is made by him, and he is required by the law (secs. 20-77) to examine the records and be guided by them in making up the land books and charging the taxes. The assessor is required (sec. 39) *each* year to ascertain *all persons* and property, *real* and personal, subject to taxation and has all possible facilities for doing so. The Legislature makes the State levy, the County Court the county levy, the assessors and clerk of the County Court make up the land books, enter the lands, extend the valuation and charge the taxes. The land owner need not and cannot meddle with the matters, and could not prevent them from charging his lands if he should desire. He ought not to suffer loss of his land for the acts or omission of these officers—he may not have voted for them.

An initial entry, etc., of the land, required by the Constitution, is all that was contemplated, or is requisite; for land once entered upon the land books need never thereafter fail to remain thereon and be charged with taxes against the proper person, unless the same be sold to the state, and in case of sale for taxes the owner has an assessment and a tax sale to deal with, with the reports and notices provided by law for his protection. Having once had his land entered on the land books, the owner and those claiming under him have every right and reason to suppose, as he has discharged his duty, that the land will be safe from everything but tax sale, and it would seem that a tract of several thousand acres could not get off the books and not be missed,—that it could not be dropped except by fraud or collusion of some officer with something to gain by the forfeiture to result. And when we see further (Sec. 10) that it is made the duty of the clerk and the assessor, severally, upon discovering

that any land has been omitted for less than five years, to enter the same on the land books and charge the taxes, it would seem to furnish further assurance that at least a half million acre tract could not escape, for five years, officers so enquiring and vigilant as assessing and revenue officers generally are, unless they or their friends had something to gain of more value to them than the "life blood" of the state. If the officers of the state would but do their appointed duty and serve the state with half the zeal they suck their share of the state's "life blood" and aid in the grabbing of lands that only through their negligence or fraud could ever fail to be charged with taxes, such thing as forfeited land would be unknown in the State of West Virginia.

The most casual examination of the constitution and the law above given for the assessment of taxes, shows clearly by the terms of the law and the necessary legal result of it, that the forfeiture is not because of any act or omission of the land owner, but may result in spite of him, and can result only "when * *" (by the negligence or fraud of the officers of the law) "the owner of any tract of land ** shall not have been charged with state taxes thereon." Forfeitures are odious in law and will not be enforced or sustained if it can be avoided. What is there about the forfeitures claimed under the West Virginia law that makes them sacred and holy things, or constitutes that "due process of law" that is the protection of the American citizen and his property, or takes them out of its operation? If the State wants the land of the citizen, why should she not proceed under the usual forms of judicial proceedings and process of law to acquire it? If she wants revenue that is exactable from it, why should she not, in the manner provided by law, levy a tax upon it and its owner and enforce payment by a sale, if need be, that might still leave the owner something? If a man covet his neighbor's land, why should he not treat with him for it, or even declare it to be his own and enter and hold it adversely? If counsel for defendants shall take me to task for suggesting the possibility, that the officers of the State or their friends may have some interest in letting large tracts of land escape assessment, or incur forfeiture, whereby such officers or those whom they privately serve, may gratuitously acquire the lands of others, and receive the premium upon their fraud, offered by this forfeiture provision, I hope they will not fail to indict, in the same bill, Judge Cooley, who says:

"Public officers may connive with rogues, to rob the citizen of his property; witnesses may testify, or officers certify falsely, and records be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown and deprive the party wronged of all remedy, has no justification in the principles of natural justice, or of constitutional law." Const. Lim., 363.

OF THE NATURE OF FOROEITURE.

PLAINTIFF'S TITLE NON-FORFEITABLE.

Ninth Specification of Error.

The error logically entitled to first consideration is the one alleged as "NINTH" in the Specification of Errors.

If forfeitures are odious, and the rule of strict construction applies, that strictness cannot be more appropriately applied than to the very word itself, and to the conditions under which a forfeiture, properly so called, may, and the conditions under which it may not occur; and a moment's consideration shows that in spite of a very general looseness of expression to be found both in statutes and decisions of courts, forfeiture, as between our modern governments and the citizen, has very narrow standing room. Under the old feudal system of land tenures in England, where estates were held of the king and the nobles, subject to various conditions, forfeiture of the estate of the feudatory, for failure to respond to the demands and duties incident to his tenure, or to comply with any of its conditions, was the natural and proper determination of the estate. The estate was *forfait*—made over—to the owner of the fee; but there was, and in the nature of the case could be, no forfeiture of the fee itself, which was a paramount title; and even in the case of forfeiture, the estate of the feudatory was not terminated by the forfeiture; there had to be an entry by the lord paramount or a judgment by inquest of office.

Of forfeiture of land, Sir William Blackstone says: "Forfeiture is a punishment annexed by law to some illegal act or negligence in the owner of lands, tenements or hereditaments, whereby he loses all his interest therein and they go to the party injured as a recompense for the wrong, which either he alone, or the public together with himself hath sustained.

"Lands, tenements and hereditaments may be forfeited in various degrees and by various means: 1, By crimes and misdemeanors; 2, By alienation contrary to law; 3, By non-presenta-

tion to a benifice, whence the forfeiture is denominated a lapse; 4, By simony; 5, By non-performance of a condition; 6, By waste; 7, By breach of copyhold custom; 8, By bankruptcy.

"The offenses which induce a forfeiture to the crown are principally the following six: 1, Treason; 2, Felony; 3, Misprison of treason; 4, *Praemunire;* 5, Drawing a weapon on a judge or striking anyone in the presence of the King's principal courts of justice; 6, Popish recusancy or non-observance of certain laws enacted in restraint of papists." Bl. Com., 267.

These were the causes of forfeiture in Blackstone's time, but the most of these are unknown to modern law, and substantially the only ones that survived until the adoption of the American Constitution, were forfeiture for crime and for non-performance of conditions; and of the former only three are known to our law, and of these only one, treason, was permitted by the Constitution of the United States to be a cause of forfeiture, and that to a limited extent only. To treason some of the States added felony, as a permissible cause of forfeiture, but most, if not all of these, like the United States, have abolished forfeiture of land as a consequence of crime; and the forfeiture or confiscation of personalty engaged in the violation of law, is because of the sin of the offending property as much as of the owner, after the ancient laws of *deodands.*

Blackstone traces the origin of forfeiture for crimes and misdemeanors to Scandinavian, or perhaps more remote, sources; but whatever its origin, it was, like all other forfeitures, an essential part of the feudal system of land tenures, all crimes being a breach of duty to the king, the ultimate lord paramount of every fief and under whom all lands were held. With the abolition of feudal tenures and our emergence from the Draconism of the dark ages, forfeiture of land, except for conditions broken or upon conviction and sentence for high crimes, is not, and never has been, any part of the law of the land in this country; and this latter kind of forfeiture, where it occurs, is, in modern jurisprudence, more properly a confiscation.

Mr. Washburn, in his work on Real Property, (Vol. III, p. 47) disposes of the question of forfeiture very briefly and in this wise:

"The English doctrine of forfeiture of lands to the State, for crime, or corruption of blood, is generally, if not universally, done away with in this country, and will therefore be no further noticed in this work."

Forfeiture for crimes was retained but a short time in Virginia, it being abolished in 1789, 13 Henning's Statutes at Large, Chap, XXX, sec. 13, as follows:

"Whenever any person shall happen to be attained, convicted or outlawed of any treason, murder or felony whatsoever, there shall in no case be a forfeiture to the Commonwealth of dower or of lands, slaves or personal estate, but the same shall descend and pass in like manner as is by law directed in case of persons dying intestate; nor shall any attainder work a corruption of blood, any law or usage to the contrary in any wise notwithstanding." This has remained the law of Virginia ever since.

Forfeitures had previously been much restricted even in case of treason, dower rights being saved.

There has been in the several Codes of Virginia and of West Virginia from 1819, to the present time, the provision:

"No suicide or attainder of felony shall work corruption of blood or forfeiture of estate."

In 1864 West Virginia, by act of the Legislature, which exceeded constitutional authority, defined the punishment of treason as follows:

"Whoever is guilty of treason against the State shall be punished with death or, at the discretion of the jury, by confinement in the penitentiary not less than three nor more than ten years, and by the confiscation of his estate." (Acts 1864, p. 783). The term *confiscation* is appropriately used.

The present Constitution (1872) provided, however, Art. III, 18, that, "No conviction shall work corruption of blood or forfeiture of estate."

So far then as Virginia and West Virginia are concerned, the above quoted statement of Mr. Washburn is well warranted, for with the exception of the Act of 1864, above mentioned, forfeiture or confiscation of real property, for criminal offense, has been unknown since the year 1789. The "forfeiture," then, with which we have to deal, unless it be for breach of condition, would seem to be wholly unique, both in land law and criminal law.

Plaintiff's Grant Unconditional.

Lands in the United States, whether derived from the United States, or from a State, are in general, held in fee simple, with no condition whatever upon failure or breach of which the estate may be forfeited. There can be no forfeiture of an uncon-

ditional estate, and such is the title granted by Virginia to Robert Morris. (p. 12).

It may be argued that there is a condition implied in every grant by the State, that the land shall be held upon the condition that the holder pay the taxes thereon, or that such a condition is imposed by law; but no one, it is thought, will contend that there is an implied condition, that the land shall be forfeited "when ** the owner *shall not have been charged with taxes*" on it, or even that he shall have it charged with taxes. The suggestion of any condition is, however, without support. It is easy for the State to embody in her grants any condition that may be desired, and it is equally easy for the State, by express and unequivocal enactment, to declare that *thereafter* all grants shall be upon such condition as may be expressed in the law. Something like this is found in the case of charters and franchises; but when the law does not so provide, there can be no ground or warrant for *imagining* a condition, where the language of the grant is inconsistent with the idea of a condition. The expression of conditions excludes those not expressed, and in the grant to Morris (p. 12) there is a stated provision concerning certain reserved land, and no other qualification whatever.

But the obligation of the member of society to pay taxes, or to discharge any other duty of citizenship, is wholly independent of the nature of his tenure, or the origin of his title to his property; for the obligation is the same in Kansas where title to land is not derived from the State, as in Virginia where it is; and property brought from without the state is subject to taxation equally with property derived from the State. The payment of taxes is a duty owed the State for the maintainance of the government, and the protection given by the laws, it is not a condition of land tenures; and though land, like other property, is liable for the payment of taxes, so it is liable for the private debts of the owner; but in neither case does the liability make the owner's estate a conditional one.

Gaines v. *Buford*, 1 Dana 488-90.

Arrowsmith v. *Burlingim*, 4 McLean 494.

Griffin v. *Mixon*, 38 Miss. 448.

In Giffin *vs.* Mixon, Judge Harris says:

"Mr. Kent, in his Commentaries, vol. 4 p. 137 (9th ed.) says: 'The doctrine of estates upon condition, in law, is of feudal extraction, and resulted from the obligation arising out of the feudal relation. The rents and ser-

vices of the feudatory were considered as conditions annexed to his fief, and strictly construed; if the vassal was in default by non-payment of rent or non-performance of any feudal duty or service, the lord might resume the fief, and the rents and services were implied conditions inseparable from the estate.'

"It will be seen, therefore, that a doctrine originating in barbarity and plunder, * * * a doctrine founded in subjection of the citizen to almost abso'ute servitude by special contract; a doctrine wholly opposed to the principles of personal freedom as well as the security of private property, can have no application, either in fact or theory, to a government like ours. Property is held by no such tenure, nor is it held of any superior.

"To hold now * * * that a citizen who purchases a tract of land by a written contract or patent * * * even of the State of Mississippi itself, conveying an absolute title for a full consideration paid, without any condition expressed upon its face, holds that land upon * * * condition not expressed in the deed or grant itself, is a doctrine belonging to the past ages of legal fictions and the divine right of kings, and not to this day of written constitutions declaring the sovereignty of the people and the servitude of governments. Indeed, under the doctrine of feudal tenures, no such arbitrary power as that set up for the State (by *legislation* alone, to appropriate to itself the property of the citizen for non-payment of tax) existed. Chancellor Kent says on this subject, Vol. 4, p. 138: 'The remedy for breach of the condition was confined to the resumption of the estate, by the donor and his heirs, and that *resumption* was required by the *just interpretation* of the law to be by *'judicial process.'*"

There is no lack of *feuds* in West Virginia, where plaintiffs' land is, but there are no feudal tenures or titles.

FORFEITURE NOT "DUE PROCESS OF LAW."

Sixth Specification of Error.

The error that includes all the others is the instruction of the court that the title claimed by plaintiff was, under the provisions of the Constitution of West Virginia, forfeited to and vested in the State; and the objection that those forfeiture provisions are wanting in due process of law, embraces the other objections urged against them; for the expression, "due process of law" is as comprehensive in its scope as the cardinal virtues of ethical philosophy, including everything that is right and just, excluding everything wrong and evil.

The provisions of the Federal and State Constitutions referred to in said specification of errors are as follows:

FROM THE CONSTITUTION OF THE UNITED STATES.

ART. 1. SEC. X., 1. No state shall pass any bill of attainder, *ex post facto* law or law impairing the obligation of contracts.

AMENDMENTS.

ART. VIII. Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishments inflicted.

ART. XIV. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

From the Constitution of West Virginia:

ART. I., 1. The Constitution of the United States of America and the laws and treaties made in pursuance thereof shall be the supreme law of the land.

3. The provisions of the Constitution of the United States and of this State are operative alike in a period of war as in a time of peace, and any departure therefrom or violation thereof, under the plea of necessity or any other plea, is subversive of good government and tends to anarchy and despotism.

ART. III, 4. No bill of attainder, *ex post facto* law, or law impairing the obligation of a contract shall be passed.

5. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offense. * * *

9. Private property shall not be taken or damaged for public use, without just compensation. * * *

10. No person shall be deprived of his life, liberty or property without due proces of law and the judgment of his peers.

20. Free government and the blessings of liberty can be preserved to any people only by a firm adherence to justice, moderation, temperance, frugality and by a frequent recurrence to fundamental principles.

ART. V, 1. The Legislative, Executive and Judicial Departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others.

Few courts have had occasion, be it said to the credit of our country, to pass judgment upon enactments like the one under consideration; but the principles by which its validity must be tested, have been frequently expounded by the highest courts and the ablest jurists of England and America. From some of the reported cases, from many states and many courts, I give extracts at some length, and invite the Court to an examination of the cases cited.

It is not to be forgotten at any time, that the provision of the State Constitution purports and undertakes by itself, "by operation" of itself, and necessarily without the aid or intervention of any other agency or power, to transfer the title to a tract of land

from one persen to another, *whenever* for a stated period of time, neither the beginning or the ending of which is determined, the owner "*shall not have been charged* on the land books with state tax on the land."

"DUE PROCESS OF LAW" DEFINED.

Mr. Webster, in the Dartmouth College case, 4 Wheaton,578, gave to the words the "law of the land," which are held to mean the same as "due process of law," (*Jelly* v. *Dills*, 27 W. Va. 274), the following definition:

"By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society." And he continues:

"Everything which may pass under the form of an enactment, is not therefore to be considered as the law of the land. If this were the case, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, *and acts directly transferring one man's estate to another*, legislative judgments, decrees and *forfeitures*, in all possible forms would be 'the law of the land.' Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. The administration of justice would be an empty form, an idle ceremony, and Judges would sit to execute legislative judgments and decrees, not to declare the law and admisinter the justice of the country."

Chancellor Kent says: "The better and larger definition of due process of law, is, that it means law in its regular course of administration through courts of justice."

In *Dorman* v. *The State*, 34 Ala., 216, (1859) a case involving the constitutionality of an act of the Legislature of Alabama, upon the ground that it took property, or deprived a citizen of property, without due process of law, the Court in defining due process of law, used the following language:

"The expressions, 'the law of the land,'—'due process of law,'—and 'due course of law'—as found respectively in the English charters, and the various State constitutions in the United States, are substantially identical,and have always been held to mean a judicial proceeding, regularly conducted in a Court of Justice, as contradistinguished from statutory enactment. Any other construction would deprive the guaranty of all its force, and put the rights it is designed to protect, at the mercy of the Legislature. If life, liberty and property could be taken away, by direct operation of a statute, the enjoyment of these rights would depend upon the will and caprice of the Legislature, and the provision would be a mere nullity. Thus construed, the Constitution would read, 'no person shall be deprived of his life, liberty or property, unless the Legislature pass a law to do so;' a prop-

osition so plain in reason and principle, hardly needs to be buttressed by authority. Chancellor Kent says: That 'the better and larger definition of due process of law, is, that it means law in its regular course of administration through Courts of Justice.' 2 Kent. 13. Chief-Justice Ruffin states the construction of these words with marked emphasis and directness—'the terms, 'law of the land' do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at an end. * * * The clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before a judicial trobunal, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law, as derived from our forefathers, are not effectually laws of the land for those purposes.'—*Hoke* v. *Henderson*, 4 Dev. 15.

"Without now indorsing that part of the opinion just quoted which implies that the trial *must* be 'according to the course, mode and usages of the common law,' it may be laid down that an act of the Legislature is not and nothing less than a regular judicial trial is, 'due process of law,' within the meaning of this clause of the Constitution."

Calhoun v. *Fletcher*, 63 Ala. 574, (1879) was a case arising upon a municipal ordinance with reference to the sale of land for taxes, which provided for the issuing of a certificate to the purchaser, which certificate should operate as a conveyance, if the property was not redeemed within a prescribed time.

The Court quotes with approval the language used in the above case, and further says:

"If the property is not redeemed within the time prescribed by the charter, the certificate shall operate as a deed of conveyance. * * * To summarise: All the various and well-guarded processes, by which taxes are levied and assessed, the fact that the tax payer is in default, the unsuccessful inquiry and search for personal property, the due and the legal advertisement and sale; all these disputable facts are proved by the collector's certificate. The purchaser is then put in possession by force (the certificate authorizes the force, and legalizes the purchaser's possession for two years, unless the property is sooner redeemed); and if not redeemed within the two years, the certificate operates as a deed of conveyance, and the title as well as the seizin of the tax-payer, is gone forever, by mere legislative enactment, without the semblance of judicial proceedings.

In Cooley's Const. Lim. 363, it is said: 'Forfeiture of rights and property cannot be adjudged by legislative act; and confiscations without a judicial hearing, after due notice, would be void, as not being process of law.' And on pages 368-9, the same standard author says: 'In judicial investigations, the law of the land requires an opportunity for a trial, if only one party is suffered to produce his proofs.' The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues, to rob the citizen of his property; witnesses may testify, or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles

of natural justice, or of constitutional law. A statute, therefore, which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property.

And in Cooley on Taxation, 377, it is said: "It would be manifest and most gross injustice to make lapse of time alone, extinguish the owners title. * * * * And it seems to us very clear that under such circumstances, it is not competent to limit a period, at the expiration of which, the tax title shall become a perfect title, and not open to controversy or dispute.' Blackwell on Tax-Titles, 449, in margin. In Burroughs on Taxation, 336, it is said: 'The doctrine is settled, that it is not in the power of the legislature, by mere legislative declaration, to divest the title of the owner.' In *Denny* v. *Mattoon*, 2 Allen, 361, 378, the Court employs the following language: 'If for example, the practical operation of a statute is to determine adversary suits pending between party and party, by substituting in the place of the well-settled rules of law, the arbitrary will of the Legislature, and thereby controlling the action of the tribunal before which the suits are pending; no one can doubt that it would be an unauthorized act of legislation, because it directly infringes on the peculiar and appropriate functions of the judiciary.' See also *Richards* v. *Rate*, 68 Penn. St. 218; *State of Maine* v. *Doherty*, 60 Maine, 504; *Conway* v. *Cable*, 37 Ill. 82.

These principles and authorities are decisive of the question we are considering. The ordinance is but an act of legislation, and possesses none of the properties of a judicial proceeding. It is violative of the Constitution, and therefore void, to the extent above pointed out; because it deprives the tax-payer of his property, without due course of law."

The court, in the above case, and Mr. Cooley, think it a "*manifest and most gross injustice* to make *lapse of time alone*, extinguish the owner's title." But that is what defendants in error contend for. One day the owner's title is complete and perfect, the next, by mere effluxion of time, it is out of him and in another, without the act, or knowledge perhaps, of either or of a living thing on earth. And to the Court and Mr. Cooley, it is very clear that "it is not competent" to do that sort of thing.

In *Pierce* v. *Kittzmiller*, 19 W. Va. 564, there is a full discussion of what is meant by this constitutional restriction.

Chauvin v. *Valiton*, 20 Pacific Reporter, 658, decided in the Supreme Court of Montana, on February 12th, 1889, is an analogous case. The syllabus reads:

Rev. St. Mont. section 816, making license fees a first lien on all property held or used in any of the trades, occupations, or professions for which a license is required, and making it the duty of the County Treasurer, on failure or refusal of any person to procure a license when required, 'to seize any of the property upon which a lien is hereby created, or any other property belonging to such person, * * * and sell the same in the manner

provided for sheriffs on execution to satisfy said license and costs,' but making no provision for giving notice to the owner of such property of the seizure and sale thereof, is unconstitutional, as depriving persons of property without due process of law.

McConnell, C. J., wrote a very clear opinion citing a great many authorities. He said:

"There is no provision for the owner to be heard; no notice is to be given him; he has no day in court." * * * "We might multiply authorities on this subject indefinitely, but we think the foregoing are sufficient to show the current of authority upon this subject; we hold that the doctrine laid down in the case of *Overing* v. *Foote* (65 N. Y. 269) towit: 'That some sort of notice of the proceeding to be had against his property, and that in some form he may be heard if wrong is apprehended before any portion of his estate is seized for the support of the government,' is the constitutional right of every citizen, and if he is not given this opportunity, and his property is taken from him, it is done without due process of law, and is an infraction of the foregoing provisions of the Federal Constitution.

* * * Such a law is against reason. It violates every sense of justice and of right. Such procedure occurring between private citizens would be regarded as gross fraud, if not theft, and, when done by the government, it cannot be characterized by a milder term than 'tyranny.'"

The act was held unconstitutional and void.

And yet the act which evokes such strong language, provided that the property should be sold for the benefit of the public and only to enforce the tax. It was not *confiscated* and given to some one who happened to be in the same business. Only the tax was taken, the surplus reverted to the owner. What would the court have said of the West Virginia forfeiture laws?

In *Wicks* v. *Monihan* (Court of Appeals of New York, 1891) 29 N. E. Rep. 139, the syllabus reads as follows:

The constitution and by-laws of the Knights of Labor, providing that on suspension of a local assembly, its property shall be forfeited, and vest in the secretary of the general assembly are void, in that they seek to confiscate, without judicial process, property which is not derived from the general assembly, but is held and owned by the local assembly absolutely. 8 N. Y. Supp. 121, affirmed. *Austin* v. *Searling*, 16 N. Y. 112, followed.

In the opinion, Follett, C. J., says:

To hold that the general assembly can by a decree divest the title to property, and vest it in itself, is giving to it a power which is forbidden to be exercised by Congress, or by the Legislature of any State. Bills confiscating the property of citizens, or of associations, without judicial process, are forbidden by the Constitution, and no person, corporation, or association authorized to acquire and hold property can be divested of it by the fiat of any organization, nor in any way without its consent, or by due process of law.

Baker v. *Kelley*, 11th Minn. 480, was an action of ejectment, and the defense a tax title. Section 1, of the act under which the title was claimed, provided that all lands theretofore sold, for taxes of the year 1859, and all previous years, which had been purchased, and were held by the City or County, or were forfeited to the State, or where the certificate of tax sales of any such lands, were held by any City or County of the State, and wherever there was any delinquent tax due in any City or County of the State, for such time, should be redeemable by the owner or owners, upon certain terms.

Section 2, of said act, is as follows: "That if any such tract or parcel of land shall remain unredeemed, or such delinquent taxes shall remain unpaid, on said 1st day of November, 1862, such lands so unredeemed, and upon which such delinquent taxes remain in whole or in part, unpaid, shall, at said last named date, become forfeited to the State."

Said Section further provides for the sale of such lands by the County Auditor at a certain time, and place, after notice published for three weeks in various newspapers.

The tax title claimed by defendants, was derived under or through the sale so made. The Court in holding the tax title void, as taking property without due process of law, uses the following language:

'Due process of law,' without which the Constitution declares no person shall be deprived of life, liberty or property, is not merely an act of the Legislature. Chancellor Kent says, 2 Com. (13) 'the better and larger definition of due process of law, is that it means law in its regular course of administration through the courts of justice,' and this is now the well-settled meaning of this clause of our Constitution. Sedgwick on Const. Law, 534; *Taylor* v. *Proctor*, 4 Hill, 140; *Hoke* v. *Henderson*, 3 Dev. 12. In *Wynehamer* v. *The People*, Comstock, J., says: "I am brought, therefore, to a more particular consideration of the limitations of power contained in the fundamental law. No member of the State shall be disfranchised or deprived of any of the rights or privileges secured to citizens thereof, unless by the law of the land, or the judgment of his peers. No person shall be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation (the language of our own Constitution). No doubt, it seems to me, can be admitted of the meaning of these provisions. To say, as has been suggested that 'the law of the land,' or 'due process of law,' may mean the very act of the Legislature which deprives the citizen of his rights, privileges or property, leads to a simple absurdity. The Constitution would then mean that no person should be deprived of his property or rights unless the Legislature shall pass a law to effect the wrong, and this would be throwing the restraint entirely away. The true interpretation of these constitution-

al phrases is, that when rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but when they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—not by an act of the Legislature, but in a due administration of the law itself—before the judicial tribunals of the State. The cause or occasion for depriving a citizen of his supposed rights, must be found in the law as it is, or at least it cannot be *created* by a legislative act, which aims at their destruction. Seldon, J., in the same case says: 'To give this clause (of the Constitution above referred to), therefore, any value, it must be understood to mean that no person shall be deprived by any form of legislative or governmental action of either life, liberty or property, except as the consequence of some judicial proceedings appropriately and legally conducted. It follows that a law, which by its own inherent force, extinguishes rights of property, or compels their extinction without any legal proceedings, whatever, comes directly in conflict with the Constitution.'

That the plaintiff was the owner of the land, and authorized to prosecute and defend in the courts, his rights thereto, is admitted. That he has been deprived of either his property or legal rights, by that due process of law which 'proceeds upon inquiry, and renders judgment after trial' cannot be pretended. If the statute should be sustained, it would effect this; for a person is deprived of his property and legal rights, when he is forbidden to test or question the validity of the title of an adverse claimant. * * *

It will be observed that our Constitution guards property with the same care that it does life and liberty. If the plaintiff can be deprived of his property for the act or omission complained of, so could he of his life or liberty. Thus far, no reference has been made to the position that the Legislature, by Section 2, of said act, divested the plaintiff of his title to the property, and declared it forfeited to the State; and the views which have been above expressed, and authorities cited, so fully cover this point, that a mere reference to it now, is only necessary. Few questions are better settled, than that the Legislature cannot thus deprive a person of his property rights. If the Legislature by this section attempted to do more, than confer on the State the power to take such further steps as were necessary in the collection of the delinquent taxes or in the perfection of tax titles, then it overstepped the limits which the Constitution has fixed to its authority.

The Article XIII under consideration "*by its own inherent force* extinguishes rights of property, *without any legal proceedings whatever*," or attempts to do so, and "comes directly in conflict with the Constitution" of the United States. The property rights are extinguished—destroyed, by the Article if at all, for the idea of any judicial proceedings for that purpose is completely negatived by the words "by operation hereof;" and as in the above case, the proceedings provided in section 4 of the Article are not to *adjudge* a forfeiture and divest the title, but to sell the land the title to which *has already been divested* "by operation" of section 6.

The Minnesota court holds with the New York court that, "to say that 'due process of law' may mean the very act of the legislature which deprives the citizen of his rights, privileges or property, leads to a *simple absurdity*."

No other process is resorted to or provided in the present case than "*the very act of legislation that deprives the citizen of his property*," and defendants in error contend that none is needed.

Taylor v. *Porter*, 4 Hill, 145-7 (N. Y.) was a case that arose upon a statute of New York authorizing a private road to be laid out over the lands of another, and in declaring the act to be void as taking property without "due process of law," Bronson, J., used the following language:

> The words 'law of the land, do not mean a statute passed for the purpose of working the wrong, that construction would render the restriction absolutely nugatory and turn this part of the Constitution into nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived any of rights or privileges unless you pass a statute for that purpose;' or in other words, 'you shall not do wrong unless you choose to do it. * * *
>
> Lord Coke, in his commentaries upon this statute [Magna Charta] says that these words, 'by the law of the land,' mean 'by due course and process of law,' which he afterwards explains to be 'by indictment or presentment of good and lawful men where such deeds be done in due manner or by writ original of the common law.' * * * The meaning of this section (of the N. Y. constitution) then seems to be that no member of this State shall be disfranchised or deprived of any of his rights or privileges unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges or that some one else has a superior title to the land he possesses, before either of them can be taken from him. It cannot be done by *mere legislation*." The court further defined "due process of law" in the provision "no person shall be deprived," &c., to mean "not less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property," and says that "the same measure of protection against legislative encroachment is extended to life, liberty and property, and if the latter can be taken without a forensic trial and judgment, there is no security for the others. If the Legislature can take the property of A and transfer it to B, they can take A himself and either shut him up in prison or put him to death. But none of these things can be done by mere legislation. There must be due process of law.

The court emphasizes the fact that a person cannot be lawfully deprived of his property by "mere legislation." It is not done otherwise in the present case, if done at all, than "by mere legislation"—"by operation hereof."

In *Barron* v. *Burns*, 39 Fed. 895, the court in commenting upon the provision in the charter of the City of St. Louis, Mo., attempting to make a tax deed conclusive evidence of nearly everything essential to its validity, says:

> It is to be conceded that the provisions of this charter respecting the validity of such deeds are very sweeping. And while the courts should treat with great respect the enactments of the legislative department of government, yet the courts, which stand as the last resort of the citizen and the sworn guardian of his property rights, cannot fail to recognize that there are some things which even the Legislature cannot do. It cannot take the citizens private property, even for public use, without due process of law. * * * Due process of law is not any process which legislative power may devise. As said by Mr. Justice Curtis in *Murray's Lessee vs. Improvement Co.*, 18 How. 276. 'The article [of the Constitution] is a restraint on the Legislature as well as on the executive and judicial powers of the goverment, and cannot be so construed as to leave Congress [the Legislature] free to make any process, 'due process,' by its mere will.

Cooley's Constitutional Limitations:

> Due process of law in each particular case means such an exertion of the power of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.

What "settled maxims" of law permit and sanction a direct legislative transfer of this plaintiff's property from him to another against his will and without fault or offense on his part, and without notice or previous enquiry? Under what "safeguard for the protection of individual rights" does the state of West Virginia, by this forfeiture law, divest the land owner of his property?

Saxton v. *Mitchell*, 78 Pa. St. 479:

A decedent left by his will the use of 20 acres of land to a religious society for camp meeting purposes. An act of Legislature directed a sale of the land and the investment of the proceeds in a more suitable camp meeting grounds. Held, that the society had the use only and not the fee, and that the Act which sought to authorize the sale of the *land*, was unconstitutional as attempting to transfer the property of one to another. It was wanting in due process of law.

Dale v. *Metcalf*, 9 Pa. St. 108:

An act validating sale by sheriffs made after return day of writ, was held to be unconstitutional, for like reason.

Lavin v. *The Emigrant Industrial Savings Bank*, 18 Blatchf., 1, discusses ably and at length "Due process of law" under the Fourteenth Amendment. This is a case wherein an Act of Legislature provided for administration upon the estate of a person absent for three years and supposed to be dead, was held to be void, the person being in fact alive. Administrator had collected money of plaintiff from defendant. Held, that plaintiff was deprived of property by the state within the meaning of the Fourteenth Amendment, when he was deprived by decision of Surrogate under Act of Legislature of the state. Held, that the prohibition extends to acts of the State through all its departments, legislative, executive and judicial.

Irvine's Appeal, 16 Pa. St. 263:

This arose upon an Act authorizing the sale of property of testator contrary to provision in will, and against the wish of certain heirs, and the Act was held to be void.

Judge Coulter declares the provision for "due process of law" in the Federal and State Constitutions to be an affirmation of the Doctrine of Magna Charta, and says:

"The whole clauses in our Constitutions were established for the protection of our personal safety and private property. These clauses address themselves to the common sense of the people and ought not to be filed away by legal subtleties. They have their foundation in natural justice and without their pervading efficacy other rights would be useless."

Palairets' Appeal, 67 Pa. St. 479.

In this case an act of the Legislature of Pennsylvania providing for the extinguishment of irredeemable ground rents, upon full compensation therefor to be ascertained and paid, was held to be unconstitutional as violating the guarranty of the "due process of law."

Judge Sharswood for the court says, in part:

"Retrospective legislation is certainly not in itself unconstitutional, unless so far as it has an effect prohibited by the fundamental law. If, however, an Act of Assembly, whether general or special, public or private, operates retroactively, to take what is, by existing law, the property of one man, and, without his consent, transfer it to another, with or without compensation, it is in violation of that clause in the Bill of Rights, Const., Art. IX., sect. 9, which declares that no man "can be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land." If this is true of a person accused of crime, to whom literally the words are applied, *a fortiori* it is so as to one against whom no accusation i

made. By the "law of the land," is meant, not that arbitrary edict of any body of men—not an Act of Assembly, though it may have all the outward form of a law—but due process of law, by which either what one alleges to be his property is adjudged not to be his, or it is forfeited upon conviction by his peers of some crime, for which by law it was subject to forfeiture when the crime was committed. If this be not so, every restriction upon legislative authority would be a vain formula of words, without life or force. For what more can the citizen suffer than to be "taken, imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled and destroyed; and be deprived of his property, his liberty and his life," without crime? It will not have escaped notice that in the clause of the Constitution referred to, property is put in the same category with liberty and life, and if an Act of Assembly can deprive of a man his property, without a trial and judgment for even legal cause of forfeiture, it may in like manner deprive him of his life or his liberty, imprison him in a dungeon or hang him without judge or jury. It is true that there are other more special declarations which give additional securities to liberty and life, but by classing all three together in this provision of the fundamental law, the people have declared their equal inviolability. There are also other special provisions as to security of property—adapted to the dangers with which in a democratic form of representative government it is more especially threatened. But neither those clauses which relate to life and liberty, nor those which regard property, weaken the power of this grand primary inhibition, which the sturdy barons of England, arms in hand, wrested from their sovereign at Runnymede, *Nulus liber homo capiatur vel imprisonetur aut dssicisiatur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittimus, nisi per legale judicium parium suorum vel per legem terrae.* This is still the corner stone of our liberties. It becomes us to watch it with the greatest vigilence—not to suffer it to be undermined on any pretext, however specious."

In *Bank of State* v. *Cooper*, 2 Yerg. 599, (24 Am. Dec. 523) the court in discussing "due process" says:

"If the construction here contended for be not the true one, it seems to me that an edict in the form of a legislative enactment, taking the property of A and giving it to B, might be regarded as a "law of the land", and not forbidden by the Constitution; but such a proposition is too absurd to find a single advocate. This provision was introduced to secure the citizens against the abuse of power by the Government. Of what benefit is it, if it imposes no restraint upon legislation? Was there not as just ground to apprehend danger from the legislature as from any other quarters? Legislation is always exercised by the majority. Majorities have nothing to fear for the power is in their hands. They need no written constitution defining and circumscribing the powers of the government. Constitutions are only

intended to secure the rights of the minority. They are in danger. The power is against them and the selfish passions often lead us to forget the right."

Fisher v. *McGirr et al.*,
Commonwealth v. *Albro*,
Herrick v. *Smith*. } 1 Gray, 1.

Fisher sued McGirr, a constable, and others, in tort, for entering his house and seizing certain spirituous liquors. The taking was admitted, but defendants sought to justify the same by a warrant for such seizure, issued by a justice of the peace, under a statute which made the keeping of such liquor, under given circumstances, illegal, provided for their seizure and destruction, after certain proceedings before the justice of the peace, and the further imposition of a fine upon the person so keeping such liquor.

Albro and Herrick were severally convicted in the lower court of unlawfully keeping such liquor. Albro appealed and Herrick sued out a writ of *habeas corpus*.

These causes were heard together and all turned upon the constitutionality of the statute, which was defended by Rufus Choate, Attorney-General, and others, and the court, composed of such judges as Shaw, Bigelow, Metcalf, Thomas and others, unanimously held the statute to be unconstitutional and void.

Fisher was permitted to recover damages, and the other parties were discharged from custody.

The act in question provided for the issuing of warrants for search and seizure upon affidavit of three persons; the owner of the goods was required to be summoned forthwith "if known to the constable," and if unknown, notice of the seizure was to be published; and judgment was to be given by the justice, condemning the goods, declaring them forfeited and ordering them to be destroyed.

The act was held to be void upon several grounds, among them being Art. 12 of the Declaration of Rights, which declares that "No subject shall be held to answer for any crime or offense until the same is fully and plainly, substantially and formally, described to him; * * * and no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, or deprived of life, liberty or estate, but by the judgment of his peers or the law of the land."

"These," says Chief Justice Shaw, in rendering the opinion of the court, "are homely and familiar maxims, scarcely requiring citation, and yet the Declaration of Rights itself (Art. 18) admonishes us that a frequent recurrence to them is absolutely necessary to preserve the advantages of liberty and maintain a free government; and that the people have a right to require of their lawgivers and magistrates an exact and constant assurance of them."

The Constitution of West Virginia (Art. III, 20) contains the same admonition.

After commenting upon the unwarrantable search permitted by the act, and the fact, that whether the owner had notice was made contingent upon his being known to the constable, and the brevity of the notice in any case, the court says:

"But there is another objection to the constitutionality of this law, of a more formidable character, and as it appears to us, quite decisive of the case. Supposing the owner of the liquor to have full notice, to have appeared before the magistrate, and to have had full opportunity to procure evidence and prepare for trial; no provision is made by the statute for a trial, for a determination by judicial proofs of the facts, upon the truth of which alone the property can be justly confiscated and destroyed. On the contrary, the statute expressly directs, that if the owner fails to appear, or (that is, if he does appear) unless he shall prove that the liquor was lawfully kept, they shall be declared forfeited and the owner shall be adjudged to pay a fine and costs. There is no room for implication; judgment shall pass for the forfeiture and fine, unless the owner can prove that they were lawfully kept. This is the most favorable provision made for him. The judgment, then, passes without trial and without proof, unless that which preceded the seizure and the seizure itself are to be considered as legal proof * * We have only to look at the plain directions of the act, to perceive that it provides for no trial, in any proper or judicial sense; that it permits a judgment of forfeiture, if no proof, or if proof not satisfactory to the magistrate, is offered by the respondent. In this respect, this enactment is in violation of the plain dictates of justice and contrary to the letter and spirit of the Declaration of Rights. This statute declares that a subject may be deprived of his property under the form of law, without meeting the witnesses face to face, without being fully heard in his defense, in an unusual mode, not by the judgment of his peers, or the law of the land."

Hibbard v. *The People*, 4 Mich. 125, arose upon a very similar act which was by a unanimous court held to be void upon like grounds, the Court saying in part:

"It has been said that the proceedings under the Liquor Law *may* be so conducted, consistently with its provisions, as to secure the person whose property is seized all his constitutional rights. If this is *possible*, that is not enough, the law must afford to the accused the means of *demanding* and enforcing his constitutional rights, and if it authorizes a course of procedure which would deprive him of them, it is void."

Boggs v. *The Commonwealth*, 76 Virginia, 989.

The act of March 6th, 1880, provided for the forfeiture, (confiscation) of vessels employed in violating the Oyster laws.

The persons operating the vessel in question, were found guilty of violation on the trial, and were convicted, and the boat was sold by the sheriff at public auction, according to the terms of the statute.

It was held by the Court that the intention of the law was to operate upon the offending vessel, but that the conviction of the persons offending, was not necessarily a conviction of the vessel; and that no proper proceedings having been had for the condemnation of the vessel, none being provided by the act, the sale by the sheriff passed no title as against owners of the vessel.

"Forfeiture of rights and property cannot be adjudged by legislative act and confiscation without a judicial hearing after due notice would be void as not being due process of law."

This case is of special interest as recognizing principles that were overlooked or denied by the same court in the earlier forfeiture cases in 10th and 11th Grattan that will hereinafter be considered.

The reasoning of the court follows that in *Fisher* v. *McGirr* and *Hibbard* v. *The People*, supra, which are cited, and the court holds the statute unconstitutional because the act "requires no notice, personal or otherwise; it makes no provision for any mode of trial, when the owner appears and asserts his title," and speaking of the possible defenses that the owner may have, the court says:

"Whatever they may be, the act of the legislature affords him no opportunity of presenting them to the court. No notice, actual or constructive, is required of the seizure of the vessel, and no provision is made for a hearing or a trial."

In all these cases, counsel for these defendants in error would have urged that if the persons complaining of the law had any defense to make, they could *show their innocence* as well in the proceeding in which they make such complaint, as in any other, and that then and there, upon *habeas corpus* even, the question of their guilt or innocence could be settled, and that the presentment of an indictment or other information or complaint by the State before they should be deprived of life, liberty or property, was an old fogy proceeding, unadapted to these progressive

times. And they would no doubt have made even shorter work of it, by saying there could be no defense. These cases impress one as constituting full, complete and due administration of justice as contrasted with the utter want of any proceeding or process in the Article in question in the case at bar.

Wong Wing v. *United States*, 163 U. S. 228, recently decided by this Court, is decisive of the question before us. In this case it was held, that the United States can forbid aliens from coming within their borders and can expel them therefrom, and can devolve the duty of identifying and arresting such persons, upon executive or subordinate officials; "but when Congress sees fit furthur to promote such a policy by subjecting the persons of such aliens to infamous punishment by imprisonment at hard labor, or by confiscating their property, such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused."

The court therefore held unconstitutional an act of Congress that provided for imprisonment as well as deportation of Chinamen coming into the United States contrary to law, the imprisonment being imposed through executive and administrative proceedings.

Here again counsel for these defendants in error would say, that the presence of the alien in the United States and his identification, was proof of his guilt, and that nothing was left to be adjudged; and that in the above case the fact of his guilt was apparent to the court and was not even disputed; and that the petitioner would have no defense to make in a judicial trial, and ought to be remanded to prison. Yet no one can doubt that such action would undermine the foundation of our liberties, and throw the administration of law and justice into anarchy and confusion.

Apply the principles of the above case to the one before us. When the State of West Virginia sees fit to promote any state policy by the confiscation of the property of land-owners, "such legislation, to be valid, must provide for a judicial trial, to establish the guilt of the accused." And to confiscate such property by legislative enactment, "would be to pass out of the sphere of constitutional legislation."

The heathen Chinaman, from whose social contact the world withdraws, is not too small, nor is the American citizen who owns or claims a thousand acres or more of West Virginia

mountains, too great, to find common shelter under the American Constitution, or to be objects of the care and protection of the law and the courts of this land.

Ulman v. *Mayor &c., of Baltimore*, 72 Md., 587. (Decided in 1890):

An Act of the legislature authorized the Mayor and Council of Baltimore to provide by ordinance for the grading, &c., of streets in that city, and for assessing the cost on the adjacent owners and collecting such assessment as other taxes are collected. An ordinance was passed for such purpose, making the tax a lien upon the property, but neither the Act nor the ordinance provided for notice to the property owners, that such improvement or assessment was to be made.

The court, after commenting on the want of notice that the ordinance would be or had been passed, or that the owners had been adjudged to pay the cost of improvement, and the want of opportunity to resist the exaction or appeal from it, says:

"If this be due process of law the provisions of the Federal and State Constitution and of Magna Charta itself are utterly meaningless and vain. Due process of law is not confined to judicial proceedings. The article of the constitution is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave the legislature free to make anything due process of law by its mere will and pleasure."

The court then quotes from *Stuart* v. *Palmer* 74 N. Y. 183, the following:

"The legislature can no more arbitrarily impose an assessment for which property may be taken and sold than it can render a judgment against a person without a hearing. It is a rule founded on the principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights; and the constitutional provision that no person shall be deprived of these without due process of law has its foundation in this rule. This provision is the most important guarantee of personal rights to be found in the federal or State Constitution. It is a limitation upon an arbitrary power *and is a guarantee against arbitrary legislation.* No citizen shall be arbitrarily deprived of his life, liberty or property. This the legislature cannot do, nor authorize to be done. Due process of law is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative, or executive in its nature. *Weimer* v. *Bruenbury*, 30 Mich, 201. This great guarantee is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."

The above language was quoted with approval by Justices Matthews and Harlan in *Spencer* v. *Merchant*, 125 U. S. 358.

See also *cases* cited *infra*.

Class Legislation, Denial of Equal Protection of the Laws.

Laws that operate unequally upon the same class of persons or property, violate the provisions of the Fourteenth Amendment, and are void.

"The equal protection of the laws is a pledge of the protection of equal laws" *Yick Wo* v. *Hopkins*, 118 U. S. 356.

Class legislation is discussed at length in *State* v. *Loomis*, 115 Mo. 307, 21 R. R. A. 789 and notes, and the cases therein cited. The court after discussing the expression "due process of law" says:

"From the foregoing description and definitions of 'due process of law', it must be evident that this Constitutional safeguard condemns arbitrary, unequal and partial legislation.

Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences that would serve for some purposes furnish no reason whatever for the classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations."

State v. *Goodwill* 33 W. Va. 179.

Act of the legislature undertook to regulate in certain ways, payment of persons employed by persons, firms, corporations and companies, engaged in mining and manufacturing, and did not embrace railroad companies, merchants and others employing labor. Held to be class legislation and in conflict with 14th Amendment and State Const, Art. III. 1.

"It is not competent for the legislature, under the constitution to single out owners and operators of mines and manufactories of every kind and provide that they shall bear the burdens not imposed on other kinds of property or employers of labor.

The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy individual rights, or does the same thing by restricting the privileges of certain persons and not of others, when there is no public necessity for such discrimination is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, and the mass of the community, and those who make the law, by another whereas a general law affecting the whole community equally, could not have been enacted."

The same doctrine is laid down in *State* v. *Fire Cr. C. & C. Co. Id.* 188; *Whally* v. *Kennedy*, 2 Yerg. 554; *Budd* v. *State*, 3 Humph. 483; *Frorer* v. *People*, 16 L. R. A. (Ill.) 492; *Millett* v. *People*, 117 Ill. 294; *Low* v. *Rees Printing Co.* 41 Neb. 127.

The application of this principle to the present case is obvious. Article XIII of the State Constitution makes a classification for legislative purposes "which has no reasonable basis upon which to stand." Horses weighing 900 lbs. each and similar horses weighing 1000 lbs. each might, with propriety, be put in different classes at a horse show, but not upon the assessors books. Tracts of land of 1000 acres and upwards and the owners thereof are made a class separated from exactly similar lands of 999 acres and their owners, similarly circumstanced and situated. The equal protection of the law is denied to the former. The owner of a tract of 1000 acres is *absolutely divested* of, and loses, his land, while the owner of a tract of 999.99 acres under identical conditions and circumstances, is not in the least affected. And this notwithstanding the fact, that the same section (sec. 6) of the article makes the "duty" of each the same, whatever may be the force of that requirement. In the language of the case above cited, is the difference between a tract of 999 acres and one of 1000 acres, or the owners thereof (the same person may own both tracts), "such as, in the nature of things, furnishes a reasonable basis for separate laws and regulations"? Is there any "public necessity for such discrimination"?

If it is replied that the legislature has subsequently passed an act which attempts to forfeit tracts of less than a thousand acres, it shows that in the opinion of the legislature there existed no justification for the classification, no "public necessity for such discrimination," and does not help the Article, which must stand or fall by itself, and can borrow no support from an act subsequently passed. It is the constitutional provision only that is on trial, and if it was invalid when adopted, it has remained so.

The Article is most obviously invalid for the reason indicated. It abridges the privilege, the right, of one citizen of the United States to hold and enjoy property upon equal terms with other citizens; it abridges his immunity from seizure, confiscation and spoliation in his property when violating no law and when uncharged with any violation; it denies to him the equal protec-

tion in his property, that is extended to others in like circumstances; it violates the principle of *equal rights* that is the foundation stone of our government.

No State shall pass any Bill of Attainder, Expost Facto Law or Law impairing the Obligation of Contracts, Art. 1 *Sex. X.* 1.

In the view defendants in error take of the forfeiture provision, it is in all essential respects a bill of attainder, or, what in contemplation of the constitution is the same, a bill of pains and penalties. It does not provide a penalty for what is, by the enactment or otherwise, declared to be an offense, leaving the question of guilt to be adjudged, and the punishment to be pronounced, by a court; but by mere enactment of a legislative body, the land owner is attainted and a sentence of confiscation is pronounced against him, leaving nothing to be done but for sentence to be executed without more ado, by any person who may profit thereby.

Whether the divestiture of the title of the land owner is to be regarded as the consequence of the act or omission of himself or of the officers of the State, or of both, it is so far as he is concerned, a punishment for something, and falls upon him.

It was held by this court in *Cummings vs.* the *State of Missouri*, 4 Wall 323, that "a bill of attainder is a legislative act which inflicts punishment without a Judicial trial," and that "such bills may be aimed at individuals or at a class and may inflict punishment absolutely or conditionally." In the present case the bill is aimed at a class, but the punishment is absolute and complete, when the victim is shown to belong to that class, a mere matter of identification, incident and indispensible to every case of the infliction of punishment, even when inflicted by a mob.

This case comes more fully within the prohibition of the Constitution, and the reasoning of the court in *Cummings vs. Missouri*, than the facts of that case did; and from that decision there would probably be no dissent at this day. This forfeiture law is harsher and more arbitrary than bills of attainder were wont to be.

In Hennings Statutes at large Vol. 9, page 463, is found an act of the General Assembly of Virginia, passed May, 1778, entitled "An Act to attaint Josiah Philips and others unless they render themselves to justice within a certain time," which is moderate by contrast with the West Virginia forfeiture law.

After reciting the crimes charged to Philips and his associates, it is enacted "that if the said Josiah Philips, his associates and confederates, shall not, on or before the first day of July of this present year, render themselves to the governor" &c. "in order to their trail for the treasons, murders and felonies by them committed, then such of them, the said Philips and his associates and confederates, as shall not so render him or themselves, shall stand and be convicted and attainted of high treason, and incur all forfeitures, penalties and disabilities prescribed by law against those convicted and attainted of high treason, and execution of this sentence of attainder shall be done by order of the general court, to be entered so soon as conveniently after notice that any of the said offenders are in custody of the public jail." The act further provides that after its passage "it shall be lawful for any person, with or without orders, to pursue and slay the said Josiah Philips and any others who have been his associates or confederates at any time after the said first day of July, provided that the person so slain be in arms at the time or endeavoring to escape being taken." Accordingly upon this act, introduced and passed in a single day, upon *exparte* and hearsay evidence, Philips and others were executed.

The outrage of this affair, excusable, if such a thing can be, in the disturbed times in which it occurred, and under the law as it then existed, while it did much to effect the abolition of acts of attainder, both in the State and Nation soon there after formed, did not prevent the State in 1835 and previously, from passing acts for the forfeiture of lands, modeled upon this act of attainder. From those acts the inspiration for the West Virginia provision was drawn, and upon them counsel for defendants in error pin such faith and hopes as they have. They will be considered hereinafter.

This act of attainder, like the forfeiture acts of later date, had the advantage of certainty as to the time when its effect should be complete, that the present forfeiture act has not. The ones at whom it was aimed, if in any way they knew that they were within its purview, knew what they had to do and could do and just when to do it, to avoid the effect of the act. The act related to a *single day certain* in the *future*, and did not operate over three years of the past and all eternity to come.

The forfeiture provision under consideration, properly interpreted would be to this effect:

Whereas &c. Be it enacted: That if all owners of tracts of

land of one thousand acres or more shall not, for any five years after the year 1869, be charged by the officers or agents of the state, with state taxes upon said tracts of land, such of the said land owners as shall not have been so charged with such taxes for any such five years, shall stand and be, by operation hereof, convicted and attainted of "crimes unknown," and shall suffer forfeiture of said lands, and the title of such owner is hereby divested out of them and is vested in any person (other than the heirs or devisees of said owners) who may covet the same and lay violent hands thereon. Provided it shall be lawful for any such person, from and after this date, to enter, with or without process of law, and seize, take and hold such lands.

In *Cummings* v. *Missouri*, in discussing the provisions in the constitution of the State, that, among other things, declared certain past acts to be criminal, fixed the penalty therefor, and prohibited all priests and ministers of the gospel from performing the functions of their calling, unless they should take oath that they had not been guilty of the offences mentioned, this Court said:

"If these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a certain day designated, do certain specific acts, they would be no less within the inhibition of the Federal Constitution." (325).

I submit that, if the Constitution of West Virginia had declared, that all such land owners should be guilty (of some offense) and be thus deprived, provided a certain specified thing (the taxing of their lands) should not be done for or within a certain, or *uncertain*, time, such provision would be not more within the prohibition of the Federal Constitution than is the provision in its present form, and in either case "there would be," to use again the language of this Court in *Cummings* v. *Missouri*, "the legislative enactment creating the deprivation without any of the ordinary forms and safeguards provided for the security of the citizen in the administration of justice by the established tribunals."

In the "Liquor cases," (*Herrick* v. *Smith*, 1 Gray, 16) Rufus Choate, Attorney General, admitted and declared "The forfeiture is nothing but a fine equaling in amount the value of the liquors." When defendants in error declare that the West Virginia forfeiture is because of the land owners' default, they are

estopped to deny that the Article imposes "a fine equalling in amount the value of the land." What more could a bill of attainder do?"

Violating the Obligation of a Contract. Ex Post Facto Laws.

This forfeiture law undertakes to create a condition that was not in the original grant either in terms or by implication, nor in the law under which the grant was issued; a condition by which the grant, absolute and unqualified when made, shall terminate and revert to the State upon the happening of an event over which the State alone has the control, the non-assessment of State tax. In this respect it impairs the obligation of a contract.

The provision, adopted in 1872 operates back to 1869, and is *ex post facto*, and retroactive as to all grants prior to 1872.

It requires neither argument nor citation of authorities to sustain these positions. It conflicts with both the said Art. I. of the Federal Constitution and its counterpart in the State constitution, Art. III, 4.

Article VIII, Amendments to Constitution.

Excessive Bail shall not be required, nor Excessive Fines be Imposed nor Cruel and Unusual Punishments be inflicted.

To the above provision of the Federal Constitution the State constitution adds. "Penalties shall be proportioned to the character and degree of the offense, Art. III, 5."

If this forfeiture rises to the dignity of a penalty or punishment for the doing or omission of something by the land owner, as it is commonly asserted to be, it falls squarely within the above prohibitions.

It may be urged that the Eighth Amendment is a restriction upon the federal government only; but it is to be remembered that the state constitution declares, that the Constitution of the United States shall be the Supreme law of the land, the effect of which declaration is, I submit, to make this Amendment operative, whether it otherwise would be or not, and to make Art. XIII of the State Constitution, subordinate to it; and it is, likewise subordinate to Art. III of the State Constitution, reenacted from the earlier Constitution (Art. II, 2.)

But whether Art. VIII of the Amendments to the Constitution, *as such*, is operative or not, the provisions it contains are

operative, as part of the "law of the land," and this has been so from remote times.

> For the bill of rights has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted, (which at a retrospect to some unprecedented proceedings in the court of king's bench in the reign of King James the second); and the same statute further declares that all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void. Now the bill of rights was only declaratory throughout of the old Constitutional law of the land; and accordingly we find it expressly holden, long before, that all such previous grants are void; since thereby many times undue means and more violent prosecution would be used for private lucre than the quiet and just proceedings of law would permit. IV Blackstone Com. 379.

So that, without the amendment, or Art. III of the State Constitution, the infliction of cruel and unusual punishments and the imposition of excessive fines, is prohibited by the Fourteenth Amendment, for the infliction of unusual punishments or excessive fines or penalties, is depriving one of life, liberty or property without "due process of law" and contrary to the "law of the land"; for these expressions are broad enough, and are intended and ought to be, broad enough, to shield "any person" within the reach of the laws of this nation, from every unjust and unusual exercise of power.

This forfeiture, then, as a penalty or punishment, is most astounding. There is no other crime (!) known to the law of this State, the conviction and sentence of which works forfeiture. A person might murder all the officers of the State government and burn down the Capitol City, and not suffer forfeiture of his estate, if convicted.

The punishment for treason against the United States, the greatest political offense against the greatest government on earth, is not visited so harshly upon the estate of a convicted traitor, as is attempted in this Article to deal with the estate of the West Virginia land owner, who is convicted of no crime, and charged with do offense. Is a fine or a penalty amounting to millions of dollars a "usual punishment" for an offense (?) of such a kind? or is "proportioned to the offense"? Failure to list a tract of one acre, and to have it charged with taxes, is exactly the same offense, if it be one at all, as failure to list a tract of a thousand acres and to have it charged with taxes. It is a mere want of action, a doing of nothing, a negation, without degree of evil; yet the penalty in one case is infinitely greater, for the same offense, than in the other, for in the latter there is

none. What must be the magnitude of an offense for which the minimum punishment is a fine of one thousand acres of land?

There would be as much justice and authority of law, for the State to impose a fine of a million dollars upon the land owner or claimant, and imprison him until he should pay it, as to confiscate property of that value; and in the present case it would be more appropriate, for then the penalty would have fallen upon the trustee, if he has failed in any duty, and not upon the unoffending purchaser.

But perhaps instead of feeling that the State has dealt severely with the unhappy land owner, whose land, by any chance whatever, the State may not have charged upon the land books, we ought rather to extol her mercy in not adding disfranchisement and corruption of blood to the punishment by forfeiture. We are not, however, without honorable companionship in our opinion and sentiments. Judge Nicholas, in *Gaines* v. *Buford*, *supra*, in like case, has this to say:

> Thus, by comparing the act of 1824 with the constitution, I find that while the legislature are expressly prohibited from passing laws to forfeit the estates of attainted traitors and felons, except during life, they have undertaken to forfeit forever the estates of those who have been guilty of no crime, unless it be a crime to have the better title to a tract of land held adversely by another. This contrast fortifies my conviction that the legislature does not possess the power to pass a bill of forfeiture like this. When the estate of an attainted felon can only be forfeited during life, it is not, within the contemplation of the supreme law, an excessive fine or a cruel punishment to forfeit forever the estate of a man, merely because he is unwilling and fails to improve it, even if he could? The constitution says, "that excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted."

This Forfeiture Provision Cannot Operate ex Proprio Vigore Because There must be an Inquest of Office.

It is a well-established and understood principle, that in order to make effectual a forfeiture of franchises or property to the sovereign power which granted the same, in order to escheat or confiscate lands or to divest and forfeit to the State any interest which is liable to forfeiture, there must be a judicial proceeding for that purpose. The facts must be found and the forfeiture must be adjudged by a tribunal having jurisdiction.

When for any cause lands escheated or were forfeited to the English crown, an inquest of office or "office found," was neces-

sary before title was vested in the crown. The case was heard and determined by a tribunal which decreed the forfeiture or escheat, and then, and not until then, was the property forfeited or escheated.

Blackstone, vol. 3, 358.
Kent's Commentaries, 13th edition, vol. 2, p. 68 (54).
Washburne on Real Property, 5th edition, vol. 3, 52.
Minor's Institutes, vol. 2, 544 (479) and cases cited.

Kinney v. *Beverly*, 2 Hen. & Mun. 318, decided as long ago as 1808, is a clear exposition of the law upon this subject. The effect of the tax law of 1792 is discussed. The important clause of the law under the consideration read as follows:

> That in case the tax on any tract of land shall not be paid for the space of three years, the right to such lands shall be lost, forfeited and vested in the commonwealth; and it shall be lawful for any person to acquire a title to any lands *so forfeited* in the manner prescribed for acquiring titles to waste and unappropriated lands on the eastern waters, by an act entitled, "An Act to dispose of waste and unappropriated lands in the Commonwealth of Virginia on the eastern waters."

The question was whether the failure to pay the taxes for three years operated to forfeit the land without any inquest of office. Judge Tucker, in an elaborate opinion, says:

> And, in both cases, the authority of Brooke, *tit.* Office, 17, was relied on to this effect. Where a man is attainted by parliament, and thereby it is ordained, "that all his lands shall be forfeited, and it is not said, they shall be in the king without office, there they shall not be in the seisin of the king, to *grant over* without *office*, for it does not appear of record what lands they are." So, in the present case, although the taxes be not paid on certain lands, the property of A, in the county of B for the space of three years, whereby the right to those lands is forfeited to the commonwealth, yet until an office be found or some other legal proceeding had (if any such be pointed out), to show the certainty of the land, the seisin thereof is not in the commonwealth to grant over; and, without such seisin, any grant thereof would be void by the common law; for the commonwealth, having but a right, and not a seisin, cannot make a grant of lands, as was adjudged in Dowtie's Case, 3 Co. 10. And this construction of the act is confirmed in my opinion, by the remarks of Sir Edward Coke (2 Inst. 221) upon that clause of the statute of Westm. 1, c. 31, which relates to tolls, by which it is declared, that if excessive toll be taken in any city, etc., the king shall seize the franchise of the fair or market, until it be redeemed by the owner. "But," says Lord Coke, "this is intended upon *an office found*; for, in statutes, incidents are ever supplied by intendment."

The Act of 1864, before noted, prescribing the punishment of

treason to the State, declares, "Whoever shall be guilty of treason against the State shall be punished with death * * and by confiscation of his real and personal estate;" but it is presumed that this would be held, even in West Virginia, to be upon conviction and sentence.

Barber vs. Nelson, 1 Little, 60, holds under the Kentucky statute, declaring lands of non-residents to be forfeited if omitted from land books, that there must be an inquest of office, though none is provided for, and that without it, the land though liable to forfeiture, is not forfeited.

Thevenin vs. Slocum's Lessee, 16 Ohio, 519, decided in 1847, was an action upon a title claimed by virtue of forfeiture under an act of the legislature, which provided that lands not sold for the want of bidders, should be forfeited to the State. In holding that the title of the owner of the lands assessed and not sold for the want of bidders, *was not divested* by reason of such alleged forfeiture, the Court says:

"But the Legislature have never treated this forfeiture as vesting the title in the State, for any other purposes than a lien for taxes due and owing, and wherever this forfeited land has been sold, it has been done under laws providing that if sold for more than the taxes due, the surplus should be placed to the credit of the former proprietor.

"In an action by such proprietor for the recovery of such forfeited land, we do not suppose that the defendant could defeat plaintiff's action by showing merely that the land had been forfeited; he must show in addition that the land had been sold as such forfeited land. Proving an outstanding title in the State by forfeiture would not be sufficient."

In *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch 602, which was a writ of error from the Supreme Court of Appeals of Virginia, the syllabus reads :

Lord Fairfax at the time of his death, had the absolute property, seizin and possession of the waste and unappropriated lands in the Northern neck of Virginia.

An alien enemy may take lands in Virginia by devise, and hold the same until office found. The Commonwealth of Virginia could not grant the unappropriated lands in the Northern Neck until its title should have been perfected by possession.

This case recognized the principle that even though the lands were subject to being divested out of the alien and transferred to the State, yet that could only be done by inquest of office, until which was had, the legal title remained in the alien.

In *Wynehamer v. The People*, 13 N. Y. 378, Judge Selden, in the course of his opinion says of "due process of law":

"It may be said the constitutional provision in question cannot, in the nature of things, apply to a case when a law enacted for beneficient purposes, operates directly upon its subject, and thus accomplishes *per se* the end in view; that in such a case it is impossible to interpose any judicial action between the enactment and its execution; and that the clause can only apply to cases where there is to be some manual interference with the rights of person or of property. But there is no such limitation in the constitution; and the few guarantees it contains, should not be curtailed by any narrow or refined process of interpretation. Such a construction would certainly nulify the provision, as the most oppressive and tyrannical ends may be accomplished by simply withdrawing from individual rights the protection of law. All vested rights to franchises would be placed by this interpretation, so far as the State Constitution is concerned, entirely at the mercy of the legislature. To give the clause, therefore, any value, it must be understood to men that no person shall be deprived, by any form of legislation or governmental action, of either life, liberty, or prosperity, except as the consequence of some judicial proceeding, appropriately and legally conducted. It follows that a law, which, by its own inherent force, extinguishes rights of property, or compels that extinction, without any legal process whatever, comes directly in conflict with the constitution."

In England there could be no forfeiture of lands for criminal offenses, except upon the sentence of the offender, for "lands" says Blackstone, " are forfeited upon attainder and not before" (IV Bl. Com. 387) and not therefore upon the *commission of the offense*, and "attainder follows sentence and does not attach upon conviction only." Id. 381.

So strict and inavriable was this rule that there could be no forfeiture in the case of *felo de se*, because there could be no sentence of the *felo*.

Bennett v. *Hunter*, 9 Wallace, 326, construes the Act of Congress of June 7th, 1862, levying a tax upon land within the several States, to provide a revenue to carry on the war. The action was brought in the Ciruit Court of Alexandria County, taken to the Supreme Court of Appeals of Virginia, and thence by writ of error to the Supreme Court of the United States. Mr. Justice Chase said, explaining the fourth section of the act:

"This section provides 'that the title of, in, and to each and every piece and parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States, and upon the sale hereinafter provided for shall vest in the United States, or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever.'

"And we are first to consider whether the first clause of this section, *propio vigore*, worked a transfer to the United States of the land declared to be forfeited.

"The counsel for the plaintiff in error have insisted earnestly that such was its effect. But it must be remembered that the primary object of the act was, undoubtedly, revenue to be raised by collection of taxes assessed upon lands. It is true that a different purpose appears to have dictated the provisions relating to redemption after sale, and to the disposition of the lands purchased by the government, a policy which had reference to the suppression of rebellion rather than to revenue. But this purpose did not affect the operation of the act before sale, for until sale actually made there could be properly, no redemption. The assessment of the tax merely created a lien on the land, which might be discharged by the payment of the debt, and it seems unreasonable to give to the act considered as a revenue measure, a construction which would defeat the right of the owner to pay the amount assessed, and relieve his land from the lien. The first clause of the act, therefore, is not to be considered as working an actual transfer of the land to the United States, if a more liberal construction can be given to it consistently with its terms.

"Now the general principles of the law of forfeiture seem to be inconsistent with such a transfer. Without pausing to inquire whether, in any case, the title of a citizen to his land can be divested, by forfeiture and vested absolutely in the United States, without any inquisition of record or some public transaction equivalent to office found, it is certainly proper to assume that an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction. *Fairfax's Devisees* v. *Hunter's Lessees*, 7 Cranch, 625. In the case of lands forfeited by alienage the king could not acquire an interest in the lands except by inquest of office. 3 Bl. Com. 258. And so of other instances where the title of the sovereign was derived from forfeiture. * * *

"Applying these principles to the case in hand, it seems quite clear that the first clause of the 4th section was not intended by Congress to have the effect attributed to it, independently of the second clause. It does not direct the possession and appropriation of the land. It was designed rather, as we think, to declare the ground of the forfeiture of title, namely: Non-payment of taxes while the second clause was intended to work the actual investment of the title through a public act of the Government of the United States, or in the purchaser at the tax sale. The sale was the public act, which is the equivalent of office found. What preceded the sale was merely preliminary and independently of the sale, worked no divestiture of title. The title indeed was forfeited by non-payment of the tax; in other words, it became subject to be vested in the United States, and upon public sale became actually vested in the United States, or any other purchaser; but not before such public sale. It follows that in the case before us the title remained in the tenant for life with the remainder to the defendant in error, at least until sale; though forfeited, in the sense just stated, to the United States."

Here was a provision, that upon failure to pay the taxes the title should "*thereupon* be vested in the United States," and it was "insisted earnestly" by counsel that such should be the ef-

fect without further ado; but the Court held otherwise. There was a tax actually, and, we may suppose, lawfully, levied, the proper and natural enforcement of which was by a tax sale. The term "forfeiture" had no application whatever to the case, as it has to no case except to that of estates and rights held upon some condition; and we submit that the learned Chief Justice was betrayed into a qualified approval of its use by its occurrence in the statute.

Judge Holt, in a very recent case, involving the validity of a tax title says:

> * * * It was not the object of this proceeding, as we have seen, to enforce any forfeiture, incipient or complete, resulting from omission, or to give the sheriff power to sell any other title derived from any other source than the one listed and assessed. We may be sure this is so, because the legislature has no power by this proceeding to transfer her [plaintiff's] title to the purchaser in any other way. It cannot, without some notice or proceeding in the nature of an inquest, declare her land forfeited for omission, non-payment, or for any other cause; and, if it could, it cannot in this mode pass her title to another, for the constitution stands in the way. Art. XIII, if not sec. 10 of Art. III. *Cunningham* v. *Brown*, 39 W. Va. 597.

The Supreme Court of Appeals of West Virginia has not passed upon the question before us, but it is not difficult to see what would be its decision, if we are permitted to judge from the language of one of the most learned judges of that court at any time, in delivering the opinion of the court in the above case. The language is without limitation in its scope or application.

This question, and also the question of the validity of the statute of the State for the forfeiture of tracts of less than one thousand acres, otherwise identical with the constitutional provision, is pending at the present time before the said court.

Under this branch of the subject may be cited all the cases that follow, especially, *Buford* v. *Gaines*, 2 Dana; *Marshall* v. *McDaniel*, 12 Bush. 378.

To Declare a Forfeiture is a Judicial Act and is Prohibited to the Legislature. The Forfeiture Contended for in this case is Legislative and Therefore Unauthorized.

> The legislative, executive and judicial departments shall be separate and distinct so that neither shall exercise the powers properly belonging to either of the others." Art. V, sec. 1, Const.

The theory of our State governments necessarily prohibits the legislative department from exercising any executive or judicial functions, and *vice-versa*.

The first enactment of the Constitution of Virginia, adopted June 29, 1776, is:

> The legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the power of more than one of them at the same time, except that the justices of the County Court shall be eligible to either House of the Assembly.

In *Loan Association* v. *Topeka*, 87 U. S. (20 Wall) 663, a case of much note, dealing with the power of the legislature, this Court, speaking by Mr. Justice Miller, has declared:

> The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.
>
> There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who are husband and wife to each other, should be so no longer, but that A should hereafter be the husband of C, and B the wife of D, or which should enact that the homestead now owned by A should be no longer his, but should henceforth be the property of B.

Calhoun v. *Fletcher*, *supra*.

> The doctrine is settled that it is not in the power of the Legislature, by legislative direction, to divest the title of the owner.

Wynehamer v. *People*, 13 N. Y. Court of Appeals, *supra*, discusses the question before us ably and at great length, several of the judges delivering opinions. The case arose upon a statute relating to the use and sale of liquors, the restrictions being such as, in the opinion of the Court, to destroy the value thereof, and consequently to deprive the owner of his property by act of legislation, and therefore without due process of law.

Judge Johnson, in his opinion therein, says:

> "The constitutional provision was intended to protect property from confiscation by legislative enactment, and from seizure, forfeiture and destruction without a trial and conviction by the ordinary modes of judicial procedure."

In *People* v. *Toynbee*, 20 Barb. 219, upon the same statute, the Court says:

"An act of the legislature is not the due process of law mentioned in the Constitution. The words, as remarked by Judge Bronson in the case last cited, (*Taylor* v. *Porter*) cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms of ascertaining guilt, or determining the title to property. In other words, a man cannot be legislated out of life, liberty or property."

Cooley, on Constitutional Limitations, discusses this question in chapter 5, pp. 109-11 (5th edition). We find there the following quotations from the following cases, each of which is approved by Judge Cooley.

"I entertain no doubt," says Comstock, J., in *Wynehamer* v. *People*, 13 N. Y. 378, 341, "that aside from the special limitations of the Constitution the Legislature cannot exercise powers which are in their nature essentially judicial or executive. These are by the Constitution distributed to other departments of the government. It is only the legislative power that is vested in the Senate and Assembly."

In *Merrill* v. *Sherburne*, 1 N. H. 199, 203, Woodbury, J., in speaking of the respective functions of the judicial and legislative departments of the government, said:

"In fine, the law is applied by the one and made by the other. To do the first, therefore—to compare the claims of parties with the law of the land before established—is in its nature a judicial act, but to do the last—to pass new rules for the regulation of new controversies—is in its nature a legislative act."

In *Wayman* v. *Southard*, 10 Wheaton, 36, Chief Justice Marshall said:

"And the difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judicial construes the law."

In *Newland* v. *Marsh*, 19 Ill. 383, we find.

"The legislative power extends only to the making of the laws. It is limited and restrained by the paramount authority of the Federal and State Constitutions. It can not directly reach the property or vested rights of a citizen by providing for their forfeitures, or transfer to another without trial and judgment in the courts; for to do so would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislative."

In *Wilkinson* v. *Leland*, 2 Pet. 657, (1829) Mr. Justice Story says:

"In a government professing to regard the great rights of personal liberty and property, and which is required to legislate in subordination to the general laws of England, it would not be lightly presumed that the great principles of Magna Charta would be disregarded, or that the estates of its subjects were to be taken away without trial, without notice and without offense. Even if such authority should be deemed to have been con-

fided by the Charter to the general assembly of Rhode Island, as an exercise of transcendent authority before the Revolution, it can scarcely be imagined that that great event could have left the people of that State subject to its uncontrolled and arbitrary exercise.

"That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of the legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no courts of justice in this country would be warranted in assuming that the power to violate and disregard them, a power so repugnant to the common principles of justice, and civil liberty lurked under any general grant of legislative authority.

"We know of no case in which a legislative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of the legislative power, in any state in the Union. On the contrary, it has constantly been resisted as inconsistent with first principles by every judicial tribunal, in which it has been attempted to be enforced."

This case concerned an act of the legislature of Rhode Island, attempting to confirm and make valid a sale of property made without authority. Rhode Island had no written constitution, other than by Royal Charter, which permitted the colony to make laws not in conflict with the law of Great Britain.

In *the University of Maryland* v. *Williams*, 9 Gill. & J. 375, Chief Justice Buchanan says:

"Independent of that instrument (the Constitution of the United States) and of any express instructions in the Constitution of the State there is a fundamental principle of right and justice, inherent in the nature and spirit of the social compact (in this country at least), in the character and genius of our government—the causes from which they spring, and the purposes for which they were established—that rises above and restrains and sets bounds to the powers of legislation, which the legislature cannot pass without exceeding its rightful authority. It is that principle which protects the life, liberty and property of the citizen from violation in the unjust exercise of legislative power.

"To say that the Legislature possesses the power to pass capriciously, or at pleasure, a valid act, taking from one his property and giving it to another, would be, in this age, and in this State, a startling proposition; to which the assent of none could be yielded."

Wilkinson v. *Leland*, 2 Pet. 657.

"We know of no case in which a legislative act to transfer the property of A to B, without his consent, has ever been held to be a constitutional exercise of legislative power in any state in the Union. On the contrary it has constantly been resisted as inconsistent with first principles in every tribunal where it has been attempted to be enforced."

Brown v. *Hummel*, 6th Barr. (Penn.) 90:

"The Constitution of the State of Pennsylvania vests the powers of government in three departments—legislative, executive, judicial; and each of

these, as well by the express terms of the instrument as by common right, and the liberty of the citizens, are confined within the limits of their respective and appropriate spheres of action. If this Court should attempt to issue general edicts, without confining itself to hearing and adjudicating cases brought before it by the usual process of law, it would be guilty of usurpation; and its rescripts would fall dead and harmless upon society."

Groesbeck vs. Seeley, 13 Michigan, 329, was a case involving the validity of the statute purporting to vest an absolute and unassailable title in the State to all lands bid off by the State at tax sale, and not disposed of for five years, regardless, of course, of the validity or invalidity of the sale. Plaintiff's claimed under deed from State, and defendant was in possession.

The Supreme Court held the statute to be invalid as taking property without due process, in that no opportunity was given to prove the invalidity of the title which was to be made good by the mere lapse of time, the party against whom it was asserted, being in possession.

The Court observed: "To hold that under any circumstances a man can be deprived of a legal title without a hearing, is impossible, without destroying the entire foundation of constitutional protection to property," and held the statute to be void saying:

"If this tax title can be made indefeasible against a title in possession, by mere lapse of time, it may as well have been declared so originally. It would in either case be nothing more or less than depriving one of his property without any legal process, and is simply a confiscation by ministerial and judicial action."

Opinion delivered by Judge Campbell, Judges Cooley and Christiancy concuring.

See also *Scott v. Toledo*, 36 Fed. 385; *Taylor v. Porter* 4 Hill, 128; *Boggs v. The Commonwealth*, 76 Va., 989; and other cases *supra* and *infra*.

The class of rights of which forfeitures most frequently occur are corporate franchises and charters, and the attempt to prove such forfeitures most frequently is made in suits brought by corporations.

Charters and franchises are grants of limited, qualified or conditional rights or privileges. They are held upon condition, and upon breach thereof the charter or franchise is liable to forfeiture, as a penalty; but though a corporation exceed and abuse its powers or commit acts that are unlawful, or that the statutes declares shall forfeit the charter, it continues neverthe-

less to exist as a corporate body until the government which created it shall, by a proper proceeding, procure an adjudication and enforce a forfeiture of the charter, *Ormsby* v. *Vt. Copper Mining Co.* 65 *Barb.* 360; *People* v. *President and Directors, Manhatten Co.* 9 *Wend* 351. The corporation can only be attacked or the forfeiture enforced by or at the instance of the State in a direct proceeding therefor and not collaterally. *State* v. *Fourth N. Y. Turnpike*, 15 N. H. 115 and cases cited.

"DUE PROCESS" CONTINUED.

The Prohibition of the Fourteenth Amendment Applies to Every Department of State Government and Limits the Powers of the State However Exercised.

The objectionable forfeiture provision appears in the State constitution, it is true, but the prohibition of the Fourteenth Amendment to the National Constitution is general—"nor shall any State deprive any person," etc. The attempt is equally futile whether it be made in one manner or another; whether, by the adoption of a constitution, the passage of a statute, or by executive act. Were this otherwise, a State, by adopting a constitution, could nullify this prohibition at will. But this cannot be done in any way. In the Article at bar, it is the State directly and in its own name, that attempts to deprive the land owner of his property, and this case is typical of the thing it was intended to make forever impossible in this land. *Scott* v. *Toledo* 36, Fed. Rep. 385; *Cummings* v. *State* of *Missouri* 4 Wall. 277; *Gunn* v. *Barry* 15 Wall. 510; *Pearce* v. *Kitzmiller* 19 W. Va. 577.

Scott v. *The City of Toledo*, 36 Fed. 385: Appropriation of land by a city for a public street, under an ordinance, authorized by statute, requiring the remaining land of owners to be assessed for the cost and expenses incident to and resulting from the appropriation and expenses of laying off and opening the street, without requiring compensation to be first made to the owners for the land so taken, held to be a violation of requirements of 14th Amendment to the Constitution of the United States, that 'no State shall deprive any person of life, liberty or property without due process of law.' Opinion by Jackson J., in which the question is elaborately discussed.

"The single question presented, therefore," he said, "is whether, in the taking of private property for public use, 'due process of law' requires that compensation shall be made to the owner of the property so appropriated. In other words, may a State or any subordinate division therof, since the adoption of the 14th amendment to the Constitution of the United States, take the property of its citizen for public purposes without making him compensation therefor? Does 'due process of law', without which the citizen cannot, under this 14th amendment, be deprived of his property by the State, involve as a necessary and essential ingredient, the payment or making a compensation for private property, appropriated to public use.'

And it is held by the Court that such taking without compensation is not "due process of law" contemplated by said 14th Amendment, quoting the following passage from *Davidson* v. *New Orleans*, 96 U. S. 102:

But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no state shall deprive any person of life, liberty or property without due process of law,' can a state make anything due process of law, which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby invested in B, would if effectual, deprive A of his property without due process of law within the meaning of the constitutional provision. * * *

If a state by its laws, should authorize private property to be taken for public use, without compensation * * I think it would be depriving a man of his property without due process of law. * * * I think, therefore, we are entitled, under the 14th amendment, not only to see that there is some process of law, but 'due process of law,' provided by the state law, when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvements, or some of these; and if found to be suitable or admissable in the special case, it will be adjudged to be 'due process of law,' but, if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law'.

And the Court further justly declares:

"Whatever may have been the power of the States on this subject prior to the adoption of the 14th amendment to the Constitution, it seems clear that since thatamendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the States cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner; and that any attempt to do so, whether done in pursuance of a *constitutional provision* or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the State, and whether done directly,

by taking the property of one person and vesting it in another, or the public, or indirectly, through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said amendment. The conclusion of the Court on this question is that since the adoption of the 14th amendment, compensation for private property taken for public uses constitutes an essential element in 'due process of law' and that, without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the federal constitution. * * * "

The doctrine laid down in the above case, and especially the language of this court adopted from the *Davidson* v. *New Orleans*, is conclusive of the question before us. Apply it to the present case. The Article in question "declares in terms, and without more, that the full and exclusive title of a tract of land which is now in A, is *hereby* invested in B," "by operation hereof shall be vested"; and (sec. 3.)"the title to lands heretofore or hereafter forfeited or *treated as forfeited*" (whether they be so in fact or not) "shall be and is *hereby transferred to and vested in* any person" &c. It has seemed to this Court, and must so seem, that such an act would, "if effectual, deprive A of his property without due process of law within the meaning of the Constitutional provision." And there can be no doubt of it. The State constitution is as impotent and ineffectual to do this as is a town ordinance. And furthur, the taking in the present case is not for a public purpose, not upon compensation and not for anything declared to be a crime or any offense.

Scott v. *McNeal*, 154, U. S. 34. Writ of error to Supreme Court of State of Washington.

Plaintiff not being heard from for seven years was adjudged by State Court to be dead, administration was granted upon his estate and land sold by administrator. Plaintiff comes to light and brings ejectment for the land. Judgment for defendant in Supreme Court of the State. Held that:

To hold such administration valid against him would deprive him of his property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States, * * "Such a statutory declaration of estoppel by a judgment to which he is neither party nor privy, which has the effect of divesting him of his property is a direct violation of this constitutional guaranty."

In the course of his opinion, Mr. Justice Gray, quoting the

provision of the said Amendment which prohibits a state from depriving any person of his property or denying the equal protection of the law, says:

> These prohibitions extend to all acts of the state whether through its legislative, executive or judicial authorities. And the first one, as said by Chief Justice Waite *United States* v. *Cruikshank*, 92 U. S. 542, 554, repeating the words of Mr. Justice Johnson in *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 244, was intended 'to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice.'
>
> Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this Court is no more bound by that court's construction of a statute of the Territory or of the State, when the question is, whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State. * * * In every such case this court must decide for itself the true construction of the statute."

"Law" is defined by Webster's dictionary as "a rule, *particularly* an established and permanent rule, prescribed by the supreme power of a State to its subjects, for regulating their actions, particularly their social actions. Laws are imperative or mandatory, commanding what shall be done; prohibitory, restraining from what is to be forborne, or permissive, declaring what may be done without incurring a penalty."

It would seem doubtful if the common law of England, which arose out of the habits and customs of the people in their general social intercourse and relations, can be said to be "prescribed by the supreme power of the State," as the words are commonly understood: but in the broader and truer sense, the people of England have been the supreme power, and thus the common law, if not "prescribed by," at least originated from, the supreme power of the State. The word "Law," then, as used in the expression "law of the land" and "due process of law," can mean nothing less than a general, pre-existing rule for the regulation and government of the actions of persons within its jurisdiction and operation, and the definition above given, comprehensively describes and defines the word as it is commonly used; and within that definition cannot be embraced final judgments, decrees and sentences, which do not lay down rules of action, but by their operation divest and transfer titles or inflict punishments, and which, whether they are within the legal competency of the body from which they emanate, or are bold usurpa-

tions of power, are not "the law of the land" in the contemplation of Magna Charta, the Federal Constitution or of any instrument where those sacred words are used.

Private Property shall not be Taken or Damaged for Public Use Without Just Compensation.

Such is the law throughout the land, independent of any enactment to that effect, for such taking would be without due process of law, as discussed in *Scott* v. *Toledo*, *supra*, (36 Fed. Rep. 385).

The right of the State to acquire property, real or personal, is limited and confined to public use, and public need. Under the law of eminent domain, a State can acquire land for a public road, a public building, or other public purpose, but it has no right to take land for the private use of its officers or to make a gratuity of it to any person. By taxation, which is but a branch of the eminent domain, a State can acquire property—money—but the purpose for which the tax is levied must be a public one or the tax is void, and a sale of property in its enforcement passes no title. The State cannot become the purchaser of property at tax sale, except in default of other bidders, and to avoid loss of tax. Why? Because the State has a public need of the tax and not of the land.

It may safely be laid down as the universal law that a State can acquire property, upon just compensation, under the law of eminent domain (including taxation, the benefits of government being the compensation) for a public purpose; by confiscation of property engaged in violation of law; by the enforcement of a fine or penalty as punishment upon conviction and sentence for an offense; by gift; by inheritance for failure of other heirs; by escheat for alienage; by *forfeiture* where it has conveyed property upon condition which has been broken; and in no other manner.

The taking of private property for private use of another has been a thing so undreampt of that it seems nowhere to have been prohibited in express terms. Such taking will hardly be thought, for that reason, to be the less unauthorized and intolerable. And yet, this is exactly the taking contemplated by secs. 3 and 6 of this Article XIII. The Article, and its authors, had no other purpose; and it is readily perceivable from the provis-

ion made in sec. 3, that whenever land is "forfeited or treated as forfeited," it could, "if effectual," have no other effect, at least as to a large portion of any large and ancient grant, and that there would not be wanting claimants of one sort or another of the kinds described, to whom, and not to the State for any purpose, the title would pass immediately upon the happening of the event, (the mere expiration of the time), whom the title would be "transferred to and vested in." If any part of the land thus goes or may go to a private person, the whole tract and the law are tinctured with that private interest. The State derives no benefit from such a transfer, the public none, nor is either interested therein. The State is at most but the dry trustee during the instant of time occupied in the transition of the title from one private person to another, through the State, if indeed it goes through the State at all, where the instrument of the "transfer," (the Article of the Constitution) is executed in advance of the transaction by which it takes effect.

There need be no privity between the State and the beneficiary of this gratuity, a possession under a bogus claim of title and payment of taxes for five years sweeps away from both the State and this plaintiff land upon which taxes have been paid by plaintiff 's predecessors for more than eighty years. The bestowal upon strangers is as gratuitous and prodigal as the spoliation of the owner is despotic and rapacious. Not thus did Caesar despoil conquored provinces; and an edict like this enactment, in the days of Nero, would have led Rome to mutiny.

Our courts have expressed themselves upon mild approaches toward this culminating monstrosity of legislation.

In *Varick* v. *Smith*, 5 Paige, 159, in discussing eminent domain, Chancellor Walworth says:

"The principles upon which forced sales of private property, were compelled by the civil law, for the public good, were certainly as extended as any government can ever claim, consistently with the private rights of its citizens, and it is not pretended that even under the arbitrary government of the Roman Emperors, it was lawful or justifiable for the sovereign to take the property of one citizen and give it to another, where the public interest was not concerned in such transfer.

Perhaps in England, where the power in parliament is said to be omnipotent, so far as the exercise of human power is concerned, there may be no remedy for such an abuse of power, where it is a concurrent act of the three estates of the realm. But in a State that is governed by a written constitution, like ours, if the legislature should so far forget its duty, and the natural rights of an individual, as to take his private property and transfer it

to another where there was no foundation for a pretense that the public was to be benefitted thereby, I should not hesitate to declare that such an abuse of the right of eminent domain, was an infringement of the spirit of the Constitution, and therefore not within general powers delegated by the people to the Legislature."

Senator Tracey in *Bloodgood* v. *M. & H. R. R. Company*, 18 Wend. 56, says:

"It has never been allowed to be a rightful attribute of sovereignty in any government professing to be founded on fixed laws, however firm the government might be, to take the property of one individual or subject, and bestow it upon another. The exercise of such a power would be incompatible with all government, and would subvert the foundation principles upon which the government was organized. Such power was expressly repudiated at the height of despotism in the Roman Empire."

Vanhorn's Lessees v. *Darrance*, 2 Dal. 304 (1795) concerned the validity of an act of the Legislature of Pennsylvania, which sought to bestow upon persons claiming title from Connecticut, certain lands lying in Pennsylvania and claimed and owned by citizens thereof. In the course of a learned and unusually well expressed opinion adjudging the act invalid, Judge Patterson, speaking of the taking by the State the entire estate of a person for the benefit of the public, said:

"This would be laying a burden upon an individual which ought to be sustained by society at large. The English history does not furnish an instance of the kind. The Parliament, with all their boasted omnipotence never committed such an outrage on private property, and if they had, it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power and not of right. Such an act would be a monster in legislation and shock all mankind.

"The Legislature therefore had no authority to make an act divesting one citizen of his freehold without a full compensation [nor with it he afterwards holds]. It is inconsistent with the principles of reason, justice and moral rectitude. It is incompatible with the comfort, peace and happiness of mankind. It is contrary to the principles of social alliance in every free government, and lastly it is contrary to the letter and spirit of the Constitution. In short, it is what every one would think unreasonable and unjust in his own case.

" * * Singular indeed and untoward must be the state of things that would induce the legislature, supposing they had the power, to divest one individual of his landed estate, merely for the purpose of vesting it in another even upon full compensation.

"When the legislature undertakes to give away what is not their own; when they attempt to take the property of one man which he fairly acquired and the general law of the land protects, in order to transfer it to another, even upon complete indemnification, it will naturally be considered as an extraordinary act of legislation, which ought to be viewed with jealous eyes, examined with critical exactness and scrutinized with all the severity of legal exposition. An act of this sort deserves no favor. To construe it liberally would be sinning against the rights of private property.

Griffin v. *Mixon*, 38 Miss. 424, cited *supra*, decided in 1860, held that so much of an act of the Legislature of Mississippi as provided for a forfeiture of land to the State for failure of the owner to pay the taxes due thereon, was in violation of the 13th section of the Bill of Rights of that State, which prohibits the taking of private property without "just compensation being first made therefor," and also of the 10th section which declares that a citizen shall not be "deprived of his life, liberty or property but by due course of law," and was null and void.

Judge Harris makes an exhaustive review of the authorities, and renders an able opinion in the case. He says:

"The question involved is whether the legislature had power, by *simple act of legislation*, to vest the title to lands delinquent for non-payment of taxes in the state of Mississippi.

"Independent of written constitutions, as early as the seventeenth century, it was said by Lord Coke, when Chief Justice of the King's Bench, in Dr. Bonham's case, 'that the *common law* doth control acts of Parliament and adjudge them void when against common right and reason.' Lord Hobart a few years after in *Day* v. *Savage*, declares that an Act of Parliament made against natural equity (as to make a man judge in his own case) was void; and Lord Chief Justice Holt is reported to have said in relation to the declaration of Lord Coke, cited above, that it 'was not extravagant, but was a very reasonable and true saying.' *City of London* v. *Wood*, 12 Mod. 687, and 10 Mod. 118."

Quoting with approval many of the cases herein cited and others he concludes as follows:

"Regarding the act in question as an assumption of executive and judicial powers by the legislature, depriving the defendant of his property without 'due course of law' or without 'just compensation first made' by a simple act of legislation, without hearing, without inquiry, without notice, it is in my judgment, in violation of our organic law and therefor void."

Norman v. *Heist* 40 Am. Dec. 495:

"It was deemed necessary to insert a special provision in the constitution to enable them to take private property even for public use; but it was not deemed necessary to disable them specially in regard to taking the property of an individual, with or without compensation, in order to give it to another, not only because the general provision in the bill of rights was deemed sufficiently explicit, for that, but because it was expected that no legislature would be so regardless of right, as to attempt it."

There can be no claim or pretense that the land taken by the State under Art. XIII of her constitution, is taken for a public purpose. The purpose is not declared by the Article, but sufficiently appears therefrom; for the purpose is to be determined,

not by any avowel, but by the destination of the property, and that, we have seen (sec. 3) becomes the property of one private person by operation of the same legislative act that takes it away from another, without compensation to the State, or idemnity to the person despoiled; and whatever advantage the State has been thought to derive from this exchange of proprietors, and which will be considered hereafter, it is plain that the person whose title to the land is thus unceremoniously transferred from him to another, can be no sharer in such advantages; and it was said by the court in *Staurt* v. *Palmer* 74 N. Y. 183, concerning the taking of land in street improvement proceedings:

"If the law should authorize such an assessment to be laid, without reference to benefits, it would either take property for the public good, without compensation, or it would take property from one person for the direct benefit of another; and in either aspect it would be unconstitutional, (citing many cases).

FORFEITURE CANNOT BE ESTABLISHED COLLATERALLY.

Fifth Specification of Error.

There was in this case no pretense that a forfeiture of the land in question, for any cause, had ever been established or decreed in a direct proceeding on behalf of the State or of any person in any way; and if there could be a forfeiture, or any kind of defeasance under the said Article, the fact of such forfeiture must first have been established in a direct proceeding therefor, and could only be proven in this case by a proper and complete record, showing a decree or judgment of forfeiture. The attempt to show the probative facts and to adjudge a forfeiture, in an action for a different purpose, brought by the opposite party, is wholly inadmissible and is not supported by any legal principle nor by any authority that we have encountered; but the contrary has been held by implication in all cases herein cited and by some of them directly. It would be as proper, in this case, to probate a will in order to show an estate by devise; to cancel a conveyance for fraud in order to vest a title in one of the parties; to try and condemn a witness of an infamous crime in order to render him incompetent to testify; or to try a man for murder or other crime upon answer to a writ of *habeas corpus*, as to try and adjudge, in this action, the question of the alleged forfeiture.

A trial of the question involves a proceeding on suggestion of defendants and a defense to their effort to establish the forfeiture, if there can be any defense, and this action of ejectment is converted into a suit in chancery with the parties transposed; which is sufficient to demonstrate that the question cannot be litigated in this action.

Can there be any defense to the forfeiture, upon the facts, supposing it to be true that the owner had not, for the requisite period, for any reason whatever, been charged upon the land books with State tax on the land? If there can be, it is as competent to make the defense in this action as it is to attempt to establish a forfeiture, and to that defense the State or some one not party thereto, might be a necessary party. But, since we have seen that "public officers may connive with rogues to rob the citizen of his property," suppose plaintiff had offered to prove that two of the defendants were the county assessor and the clerk of the county court respectively, and the third was the agent of the land owner, charged with the care of the land and the payment of taxes and supplied with money therefor; that by collusion among them, the land had either been dropped from the land books, or the taxes not charged and extended against it; that the money to pay the taxes had been divided among the conspirators and false reports had been made to the owner; that the conspirators were claimants of the land under the colors of title mentioned in Sec. 3, and that the title to the land would be "transferred to and vested in" them upon the expiration of their five year conspiracy and fraud. The court below, to sustain the view that the title has vested in the State, must have rejected the offer on the ground that it was an attempt to divest the title of the State, and could only be done in a chancery suit therefor; or that there could be no defense. Clearly all evidence upon the subject of forfeiture would be incompetent except a decree of a competent court in due form, which could only be impeached by showing the law to be invalid, and the court below should have so held. But would not these facts defeat the forfeiture? If they would, it could be only because the owner had not been divested by "due process of law"; if they would not defeat the forfeiture, but the conspirators should acquire the title and be inviolable in their fraud, it would be because such taking by their fraud and conspiracy, would be due process of law—that "*Due Process*

of Law" that has been the boast of the Anglo-Saxon for centuries.

Suppose that instead of the *owner* being charged upon the land books with the taxes upon the land, the land and taxes are, for any reason whatever, charged to another, but the taxes are paid by the owner. Is the land nevertheless forfeited? The Article says so, and affords no one opportunity to controvert it, and does not contemplate the possibility of a defense.

What if by invasion or insurrection the county government should be suspended and no land books should or could be made out, and the owner of land should therefore not be charged on them with taxes on his land, would that be no defense? Would the land nevertheless be forfeited? What if the legislature should provide by law that non-resident land owners should return their land, and pay taxes, directly to the State auditor or treasurer or other State officer, as railroad companies do, upon pain of forfeiture, and that should be done; would the lands still be forfeited because not charged on the land books of the county? There would be the Constitutional provision, which the legislature cannot abolish. Are all the railroad lands in West Virginia forfeited? If there can be a defense to, or avoidance of, forfeiture on any grounds, the Article provides for and contemplates none and is void; for it must so provide. *Kuntz* v. *Sumpton*, 117 Ind. 1; *Stuart* v. *Palmer*, 74 N. Y. 183; *Boggs* v. *The Commonwealth*, 76 Va. 989; *Fisher* v. *McGirr*, 1, Grey 1; *Wong Wing* v. *United States*, 163 U. S. 228.

If, the land not being charged, no defense such as I have mentioned can be permitted to defeat or relieve from the forfeiture, then most clearly the Article is void, independently of the other grounds of invalidity. It is what may be done by the authority of a law, that is the test of its constitutional validity.

It has been attempted in numberless cases to prove in suits between corporations and individuals, violations of the terms and conditions of the charter or of the law relating to it, and to show a resulting forfeiture, to defeat the suit: and it has been invariably held that this cannot be done and that the only competent evidence to prove such forfeiture is the judgment of a court directly upon the point. Some of the many cases that so hold are: *Cleveland & Pittsburg R. R. Co.* v. *Speer*, 56 Pa. St. (94 Am. Dec. 84); *Banks* v. *Poitiaux*, 3 Rand. (Va.) 136; *Trustees Vernon Society* v. *Hill*, 6 Cowen, 23; *Regents University of Md.* v. *Williams*, 9 Gill & J., 365; *Conn. & Pass. River R. Rs.*

v. *Bailey*, 24 Vt. 465; *Brookville & Greenburg Turnpike Co.* v. *McCartley*, 8 Ind. 392; *Cahill* v. *Kalamazoo Mut. Ins. Co.* 5 Douglass (Mich.) 124 (43 Am. Dec. 457); *Irvin* v. *Lumberman's Bank*, 2 Watts & S. 203. Also, Angel and Ames on Corporations, 777.

The law laid down in these cases is well stated in *Irvin* v. *Lumberman's Bank*, *assumpsit* to recover amount due on notes, the defense, non compliance with the laws chartering and governing bank, and the consequent forfeiture of charter and disincorporation of bank.

"The Act of the 25th March declares the charter of a bank, neglecting to pay or declare dividends, absolutely null and void and of no effect whatever; and that the bank from thenceforth shall be deemed and taken as dissolved, unlawful and unincorporated. The 7th section of the Act incorporating the Lumberman's Bank, also declares that no discount shall be made, or any note issued by the bank until the whole of the capital stock shall be paid in. These prohibitions and restrictions are very positive and expressed in strong language; and if the bank has omitted or neglected to comply with them, and the proper steps had been taken, the charter would have been declared by the proper authority null and void. But, the difficulty that meets the defendants, is, that we cannot judicially know, nor can we now investigate the truth of these allegations; for if there be anything settled, beyond all cavil and controversy, it is, that the violation of a charter of incorporation cannot be made the subject of judicial investigation in a collateral suit. The only evidence competent to prove the forfeiture of a charter is the judgment of a court directly on that point."

There is no distinction in principle between the class of forfeitures last mentioned and forfeitures of titles to land, where there can be a forfeiture, and confiscations called forfeitures. Charters, like titles to land, are created by matter of record and can be divested or transferred only by matter of record.

A quite sufficient reason, and except the invalidity of the law no reason is more cogent, why forfeiture cannot be charged, enquired of and established collaterally and in a case like the one at bar, is that it is an assumption and exercise of criminal jurisdiction by a civil tribunal and in a civil action; for, give it whatever outward form and dress we may, the law by which the State undertakes to take away a man's property as the consequence, whether direct or remote and incidental, of any act or default of himself or of another, or of both jointly, is, in its essence, a criminal law, and must be enforced according to the practice, and under the rules of evidence, pertaining to criminal proceedings. *Cummings* v. *State of Missouri*, 4 Wall, 329. The defendants in this cause can lawfully claim no advantage that

would be denied the State, behind which they strive to shelter their tortious possession, if the State were prosecuting an action for the forfeiture.

In suits to recover forfeitures the rules in criminal cases apply and all facts material to sustain the suit, must be proved *beyond a reasonable doubt. Riker* v. *Hooper*, 35 Vt. 457 (82 Am. Dec. 646) and cases cited. The person against whom the forfeiture is to be enforced has the right to have the question tried under that rule, by a jury who shall render their verdict under the instructions, and not by the *direction*, of the court.

If the forfeiture is a punishment, and is meant as such, as was said by this Court in *Cummings* v. *Missouri* and *Ex parte Garland*, then that for which the punishment is inflicted must be *crime*, and a most grievous one in the present case, if its magnitude is measured by the penalty. Picture, then, this plaintiff in error upon trial for a crime not imputed to him but to some other, for which neither he nor that other have been arraigned or accused, for which the certain penalty is some hundreds of thousands of dollars, to be exacted from this plaintiff in error who is confessedly innocent of any wrong; then picture the Court, upon an unauthorized, *ex parte* certificate of one officer, and an unauthorized, *ex parte* report of another, directing the jury to convict, and we have before us what occurred, in substance and effect, upon the trial of this cause in the court below.

In *Riker* v. *Hooper*, *supra*, defendant had sued plaintiff in trover for an impounded horse and had suffered judgment, the important question being as to notice of impounding. Plaintiff then brings this action to recover the forfeiture, and offers in evidence the judgment in trover, which was admitted in the court below. In holding such action to be error, the Supreme Court of Vermont says:

> "All who are conversant with courts must have observed that juries will render verdicts in civil cases upon slight evidence—the mere balance of probabilities, when in criminal cases nothing would induce them so to decide. The law justifies them in so doing. The distinction is an important one and leads to widely different results. To admit the judgment in trover as conclusive here, might operate to deprive the defendant of the right to have the rule of full proof in criminal cases applied to this case. But we do not think it admissible even as *prima facia* evidence of the legality of the notice.

If conclusive argument upon this question is needed, it is found in the following from the opinion of *Gaines* v. *Buford*, *supra*.

"It is not a satisfactory answer to these suggestions that the question of forfeiture is adjudicated upon by a court of justice, and that Gaines has had a public trial, before a jury, in this action of ejectment. He was there defending no plaint of the commonwealth; there was no accusation against him at the instance of the commonwealth, of which he was notified, and called upon to defend; nor was the jury sworn to try an issue between them. It was no prosecution, "carried on in the name and by the authority of the Commonwealth of Kentucky." The question of forfeiture and divestiture of the title came up collaterally only. It was used as a part of the defendant's case, to show that the plaintiff's title had, therefore, before the institution of the suit, passed from him and vested in the commonwealth. The forfeiture was the result of nothing done in that suit. The verdict and judgment formed no condemnation upon which to base it, and from which it could follow as an incident. They were themselves but the result of a forfeiture theretofore incurred, and of a divestiture of title which had theretofore taken place. The Court and jury were not a means for carrying into effect what the legislature had commanded, but acted upon what it was supposed the legislature of itself had already done. The title passed from Gaines on the 2nd of August, 1825, long before this trial, or it is still in him."

Some Similar Cases.

Marshall v. *McDaniel*, 12 Bush. 378 (Ky. 1876).

Was a case similar to the one at bar, and the greatest part of the opinion delivered by Chief Justice Lindsay is as follows:

"By section 5 of an act approved Dec. 19th, 1801 (2 Statute laws, page 1072), it was provided that 'Any person (infants and persons *non compos mentis* excepted) claiming lands in this state and failing to list the same for taxation, in case of a resident when legally called on by a commissioner of tax, and in the case of a non-resident, with the auditor on or before the first day of October next, shall for and in consequence of such failure, forfeit his or her claim, to the commonwealth.'

"In the construction of this act it was held by this court that the failure by claimants of lands to comply with its provision did not *ipso facto* divest them of title and vest it in the commonwealth, but that in each case an inquest of office found was essential to make complete and effectual the forfeiture.

"But, afterward, on the 12th of January, 1825, it was enacted 'that in all cases where any lands shall hereafter be forfeited for failing to list for taxation, or stricken off to the State, the title of such lands shall vest in the commonwealth by virtue of this act without any inquest of office found, unless said lands shall have been redeemed according to law." (2 Stat. Laws, page 1079)

"Appellants do not claim that the lands covered by the patent to Bush and Thompson were ever stricken off to the State, nor that the supposed forfeiture has at any time been perfected by a proceeding made a matter of record. But, upon proof of the fact that the public records fail to show that for certain years whilst the act of 1825 was in force, and before appellee claims to have acquired title, Bush & Thompson failed to list the lands for taxation, they insisted the title was forfeited to the commonwealth and

that the lands were therefore subject to entry, under the provisions of the act of March 2nd, 1860.

"Conceding that the proof shows *prima facie* the lands were not listed for taxation and that the failure to list falls within the scope of the act of 1825, we will proceed to inquire whether it was within the power of the legislature to provide for the infliction of such a penalty without an inquest of office found? * * *

"Self enforcing penal statutes are repugnant to the plainest principles of justice, and are utterly inconsistent with the fundamental maxims of a government in which the judicial power is vested in a department separate from and independent of the law-making power.

" 'To enjoin what shall be done or what left undone and to secure obedience to the injunction by prescribing appropriate penalties, belongs exclusively to legislation. To ascertain a violation of such injunction, and inflict the penalty, belongs to the judicial function.' (*Gaines* v. *Buford*, 1 Dana, 481).

"By the Magna Charta it is declared that no citizen shall be disseized of freehold or be condemned, but by the lawful judgment of his peers or by the law of the land. The substance of this declaration is contained in our Bill of Rights. Its meaning and intention is that no man shall be deprived of his property without being first heard in his own defense.

"As said by this Court in the case of *Page* v. *Hardin*, (8 B. Monroe, 672), 'we shall not argue to prove that in a government of laws a conviction whereby an individual may be deprived of valuable rights, and may moreover be seriously affected in his good fame and standing, implies a charge and trial and judgment with opportunity of defense and proof.'

"Bush & Thompson were at no time arraigned for failing to list their land for taxation. They had no opportunity to be heard or to make defense, and yet the appellants, in a contest with the vendees of Bush & Thompson, are asking the courts to try the question of their guilt, and to adjudge that more than forty years ago the patentees neglected to perform a public duty, and thereby forfeited to the commonwealth their title to the land in controversy."

"It may be that the act of 1825 was intended to confer power upon the courts in determining the rights of individual litigants to enter into collateral inquiries of this nature; and in the case of *Robinson* v. *Huff & Wittaker* (3 Littell, 38) it is intimated in a dictum that the legislature had the power to take and pass the title to real estate without inquest of office, and therefore to authorize the trial of a man's guilt, and the infliction of the prescribed penalty in another than a direct proceeding against him. This conclusion seems to have been based upon the idea that the right of the citizen depends alone upon the common-law rule that no freehold may be given to the king, nor derived from him, but by matter of record, and that this common law is within the legislative control. But when it is attempted to pass title to the commonwealth and to forfeit the citizens property by way of punishing him for failing or neglecting to perform a public duty, his right to be heard in his own defense does not depend upon the rules of the common law; it is secured to him by the constitution. (*Gaines*. &c. v. *Buford*, 1 Dana, 481; *Page* v. *Hardin*, 8 B. Mon. 672; *Commonwealth* v. *Jones*, 10 Bush., 725; *Burkett* v. *McCarty*, 10 Bush, 758; *Griffin* v. *Mixon*, 38 Miss. 424.)

"We conclude without hesitation that so much of the act of 1825 as pro-

vided that for a mere failure to list lands for taxation the title should be forfeited, and should *ipso facto*, without inquiry or trial, and without opportunity to the party supposed to be in default, even to manifest his innocence, be vested in the commonwealth, is unconstitutional and void.

"To deny to the legislature the power to work forfeitures for the non-listing of property for taxation, by the mere inherent force of the legislative enactment, is not to question its rights to provide that without judicial proceedings it may cause property to be assessed, taxes to be levied, tax precepts to be issued, and the tax payers property to be seized and sold for the purpose of enforcing collections. * * * *

"But when the commonwealth, instead of thus subjecting to sale the delinquent tax-payer's property, or so much as may be necessary to raise his proportion of the public burden, undertakes to treat his delinquency as a crime, and to punish him by forfeiting his estate, the constitutional guarantee which secures to a citizen the right to be heard before his freehold shall be seized or he be condemned, and to be proceeded against in accordance with "the law of the land," applies, and the courts cannot, in deference to the legislative department of the government, hesitate to vindicate the constitutional rights of the individual."

The doctrine of the above case has lately been reaffirmed in the Supreme Court of Kentucky, in *Packard* v. *Beaver Valley Land & Mining Co.*, 96 Ky. 249 (1894,) the syllabus of which is as follows:

"So much of Sec. 1, Art. 16, Chap. 92, of General Statutes, (old edition) as declares that the failure of a non-resident to list his lands for taxation within the length of time therein fixed, shall operate as a forfeiture of his lands to the Commonwealth without judicial or other proceedings to declare the forfeiture, is unconstitutional and void."

And this was for a *failure by the owner* to list—not a failure by *the State* to charge taxes, or "when the owner shall not have been charged."

Gaines v. *Buford.*

Referred to in *Marshall* v. *McDonald*, *supra*, decided in 1833, holds invalid a statute of Kentucky, requiring owners of certain lands, to improve a certain portion thereof, and prescribing forfeiture of the lands for failure to improve. The case contains a learned and able discussion of many of the objections that are here urged against forfeiture.

State v. *Heman* 70 Mo. 441. (1879)

Sec. 116 of Act of 1865, is as follows:

"Every tract or town lot offered for sale by the collector, as hereinafter provided and not sold for want of bidders, shall be and the same is hereby declared forfeited to the State of Missouri, and thenceforth all right, title and interest of every person whomsoever, in and to such land or lot shall be considered as transferred to and vested absolutely in the State, and such

real estate shall not afterwards in any case be subjebt to taxation and sale as other lands, except as hereinafter provided until again sold to some person by the State or redeemed."

Sec. 117 provided for redemption within two years by payment of double the amount for which the land was forfeited, all taxes accruing thereon prior to the redemption with 15 per cent. interest, &c.

The court held that Sec. 116 of said act did not vest in the State an absolute title to the land struck off to the State, but only gave a lien for the taxes.

Scharf, Commissioner of the Land Office v. *Tasker*, 73 Md. 380, (1891.)

In delivering the opinion of the court, Judge McSherry, says:

"During the January session of 1890, the General Assembly passed an act entitled, 'An act to provide for the assessment of the unclaimed military lots and tracts of land in Allegheny and Garrett counties, and for the collection of State and county taxes thereon, by selling the delinquent lands, and turning the net proceeds into the State Treasury.' By the first section, after directing that public notice should be given, warning the owners of unassessed military lots, lying in the two counties named, to establish their title thereto on or before the first day of April, 1891, it was provided that upon failure of the owners to comply, 'all their rights shall be forfeited to the State.' * * * * * *

"The first section of the act of 1890 is palpably in conflict with the organic law of the land. After the close of the Revolutionary War, the State of Maryland divided large tracts of land lying west of Fort Cumberland, into lots of fifty acres each, and allotted to every commissioned officer of the Maryland Line, four, and to every private soldier, one of those lots which are now known as 'military lots.'

"Owing to lapse of time, and other causes, the present owners of many of these military lots, are unknown, and the object of the First section of the act of 1890, was to compel these unknown owners, to establish their title, so that the property might be placed upon the assessment books of Allegheny and Garrett counties. But the legislature exceeded the limits of its authority, when it undertook in the same section, to *forfeit* the property, the title and estate, of all unknown owners upon their failure to produce, within the time designated, the evidence of their title. It needs no argument and no citation of authority, to show that the title of the unknown owners, of these lots, cannot be forfeited without due process of law; and that such legislation as this, is far from having even the semblance of due process of law.

"Whilst it might not be inappropriate to comment upon, or to criticise, the questionable propriety of this fruitless effort to confiscate the property which the State, more than one hundred years ago, in a spirit of gratitude, voluntarily donated to the heroic men, who fought with such signal and such distinguished courage, in the protracted struggle for our independence, we should perform our duty but imperfectly if we hesitated to

declare with unequivocal emphasis, that this feature of the Act is plainly in contravention of the twenty-third Article of the Declaration of Rights."

Here is no question about inquest of office or other proceeding to effect or establish or prove a forfeiture. The court goes to the bottom of illegality and tears it out by the root, by holding that the legislature had exceeded its power. The court calls it by its right name—confiscation.

Eastern Land, Lumber and Manufacturing Co. v. *State Board of Education*, 101 N. C. 35, (7 S. E. 573) (1888).

The case arose under the Chap. 36, Laws of 1842-3, which provides as follows:

"That any person or persons having heretofore at any time obtained a grant or grants from the State for any swamp lands, and who, or their heirs or assigns, have not regularly listed the same for taxation and paid the taxes thereon to the person or persons entitled to recieve the same, such person or persons so having obtained such grant or grants, their heirs or assigns *shall forfeit* and lose all right, title and interest in the said swamp land, and the same shall, *ipso facto*, revert to and be vested in the State, unless such person or persons, his heir or their heirs or assigns shall, within twelve months from the passage of this act pay to the sheriff of the county in which said lands lie all the arrearages of taxes due on said lands with the lawful interest thereon from the time said taxes ought to have been paid."

The land in controversy, part of a grant of 90,000 acres made in 1795, was "swamp land," and was unoccupied and not listed for taxation from 1806 to 1873, in which year purchasers from the heirs of the patentee went into possession and began listing and paying taxes on the land, but no arrearages of taxes was paid. In 1887 the Board of Education went upon the land and surveyed out the boundaries, claiming the land as forfeited to the State under the act of 1842-3, the second section of which vested the title to lands so forfeited in President and Director of the Literary Fund under which said Board claimed.

Plaintiff brought civil action under the Code to restrain defendants from expelling plaintiff, and to quiet plaintiff's title. Decree for plaintiff, and defendant Board of Education appealed.

The court says:

"The strong presumption is that the statute harmonizes with the constitution and is valid; but we are not called upon to decide whether it is or is not so, because this court interpreted it in *Phelps* v. *Chesson*, 12 Ired. 198,

and expressly decided that inasmuch as neither the State nor its assigns (the immediate predecessor corporation of the defendant appellant) had taken any proceedings, or in any way signified an election to defeat the estate of the alleged defaulting party, it was still in him, and he was entitled to maintain his action.

"Counsel for appellant seemed to question the correctness of this interpretation. We think it is reasonable and just, and it seems to us fully warranted, certainly by the spirit and reason of the statute. It is not to be presumed or merely inferred that the legislature intended to deprive the grantee of his estate without affording him opportunity, in some affirmative way, that actively puts him on notice to defend his right, if he shall see fit, and an intention to do so could only appear by clear and explicit terms, leaving no doubt as to such intent, and we forbear to say here whether such an enactment would or would not be of force for any purpose. The reasonable inference is that the legislature intended to allow such opportunity and it sufficiently appears that it has done so. * * * * Moreover, it is not declared in the statute that the land shall at once be *forfeited* to the State on such failure to list the land for taxation and to pay the taxes due on account of it or at the end of twelve months."

It is to be observed that in the case at bar, no action of any kind has been taken by the State, concerning the forfeiture, if such be needful.

Phelps v. *Chesson*, above referred to, arose upon the same statute of 1842-3.

The court says:

The defense relied on this, that the title of the plaintiff, * * * has been divested by the Act of 1842, Ch. 36, sec. 1.

To this the plaintiff replies: First, supposing the Act of 1842 to be constitutional, no proceeding had been taken, nor had the president and directors of the Literary Fund in any way made an election to divest the plaintiff's title by force of this statute. Second, the statute is unconstitutional.

Our opinion being very clear with the plaintiff upon the first point, we shall not enter into a consideration of the second, for the reason that we deem it disrespectful to the legislative branch of the government to call in question the constitutionality of the statute, unless the decision of the cause makes it necessary to do so. * * * Admit that this act has the force of inserting in the original grant a condition, that, if the taxes are not paid when due, but shall at any time be in arrears, 'the land shall *ipso facto* revert to and be vested in the State;' according to the well settled principles of law, if the taxes were in arrear at any time, the estate created by the grant would not be defeated and revert to the grantor, unless some solemn act was done by which to enforce the condition, for the estate having commenced by a solemn act, viz: *A grant* must be defeated by an act equally solemn, upon the maxim of the common law, '*eo ligamine quo ligatur.*

If a feudal tenant failed to perform the services, his estate was not defeated until the lord had judgment in a writ of cessavit. If a subject incurs

a forfeiture by committing treason, his estate is not defeated until "office found." If a feoffment is made on condition, and the condition be broken, the estate continues until it is defeated by the entry of feoffor or his heirs. Coke on Lit., chapter on Conditions.

The law books teem with cases fixing the principle, that an estate once vested cannot be defeated by a condition or forfeiture, without some act on the part of the grantor or his heirs, by which to take advantage of the condition or forfeiture, even when the words of the conditions are the estate shall therefore be void and of no effect, which words have the same legal effect as *ipso facto* void.

The court carefully forbears in both the above cases to express an opinion upon the constitutionality of the statute, but it is plain to be seen what its opinion would be if the decision of the case required its expression. The words "by operation of law" certainly have no greater force than the words "*ipso facto* revert to and be vested," and leave quite as much room for the interpretation that something in the nature of an *inquest of office* or direct adjudication, upon notice and hearing, in a proceeding for the purpose between the parties, is essential to a divesting of the "forfeited" title.

In this connection it may be proper to refer to the provisions of the West Virginia statute requiring reports and records to be made by various officers, and particularly by the Auditor in pursuance of the forfeiture, to be noticed hereinafter, and to insist they must affirmatively appear to have been made, and that not having been made, the forfeiture, even according to the terms of Article XIII, is incomplete and ineffectual to divest title.

Hoke v. *Henderson*, Devereux's Law 1; declared a statute of North Carolina, which attempted to transfer an estate in an office from one person to another, unconstitutional and void, and we quote from the able and elaborate opinion of Chief Justice Ruffin in that case. The act did not apply to particular persons by name, but provided for elections to fill certain offices then filled by appointment "during good behavior."

"The great and essential differences between governments, as distinguished from one another by their constitutions, consist in the greater or less security of private right, against the violence or seizure of those who are the government for the time being. It is true, the whole community may modify the rights which persons can have in things or at their pleasure, abolish them altogether. But when the community allows the right and declares it to exist, that constitution is the freest and best, which forbids the government to abolish the right, or which restrains the govern-

ment from depriving a particular citizen of it. In other words, public liberty requires that private property should be protected even from the government itself.

The people of all countries who have enjoyed the semblance of freedom, have regarded this and insisted on it as a fundamental principle. Long before the formation of our present constitution it was asserted by our ancestors on various occasions; and, in one sense of it, its vindication produced the revolution. At the beginning of that struggle, while the jealousy of power was strong, and the love of liberty and of right was ardent, and the weakness of the individual citizen against the claims of unrestricted power in the government was conspicuously felt, the people formed the constitution of this State; and therein declared "that no freeman ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed, or *deprived* of his life, liberty or *property*, but by the law of the land."—(Bill of Rights, s. 10). By the fourth section it is declared, "that the legislative, executive and supreme judicial powers of government ought to be forever separate, and distinct from each other."

In absolute governments, whether hereditary or representative, the division of the powers of government is unimportant; because that body in which resides the superior authority can, at will, make it supreme and absorb all the other departments. It does not follow, therefore, that because the British parliament, whose supremacy is acknowledged, decides questions of private right and puts that decision, as it does its other determinations, into the form of a statute, that whatever it does is legislative in its nature. It can adjudicate and often does substantially adjudicate when it professes to enact new laws. That faculty is expressly denied to our legislature, as much as legislation is denied to our judiciary. Whenever an act of the assembly, therefore, is a decision of titles between individuals or classes of individuals, although it may in terms purport to be the introduction of a new rule of title, it is essentially a judgment against the old claim of right; which is not a legislative but a judicial function. It may not be easy to distinguish those powers and to define each, so that an act shall be seen at once to be referable to the one or the other. But I think, that where a right of property is acknowledged to have been in one person at one sime, and is held to cease in him and exist in another, whatever may be the origin of the new right in the latter, the destruction of the old one in the former is *by sentence*.

* * * * * * * * * *

"The question is not now upon the validity of the title under the new elections to the office, if vacant, or when it shall in future, become so; but upon the right claimed under it to immediate induction, notwithstanding the office is already full by a previous legal appointment of another person. To sustain this claim the previous appointment must be vacated or the officer adjudged out. When the act proceeds to do this, it becomes, in that respect, an adjudication. Although it is not purely so in all its provisions, and may not in any be conclusively and definitively so, because it does not decide *inter partes* by name; yet it partakes of that nature, for the reasons already stated, and the prohibition of the constitution is as imperative against the assumption of the judicial power by the legislature in combination with their legislative authority, as if the act were a single and simple one of direct adjudication. Creating a right, or conferring it on

one, when not already vested in another, is legislation. So prescribing the duties of officers, their qualifications, their fees, their powers and the consequences of a breach of duty, including punishment and removal, are all political regulations, and fall within the legislative province. But to inflict those punishments, after finding the default, is to adjudge; and to do it, *without default*, is equally so and still more indefensible. The legislature cannot act in that character; and therefore, although their act has the forms of law, it is not one of those *laws of the land*, by which alone a freeman can be *deprived* of his *property*.

Those terms "law of the land" do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizens suffer, than to be "taken, imprisoned, desseized of his freehold, liberties and privileges; be outlawed, exiled and destroyed; and be deprived of his property, his liberty and his life," without crime? Yet all this he may suffer, if an act of assembly simply denouncing those penalties on particular persons, or a particular class of persons be in itself, a law of the land within the sense of the constitution; for what is in that sense, the law of the land, must be duly observed by all, and upheld and enforced by the courts. In reference to the infliction of punishment and divesting the rights of property, it has been repeatedly held in this State, and it is believed, in every other of the Union, that there are limitations upon the legislative power, notwithstanding those words; and that the clause itself means that such legislative acts, as profess in themselves directly to punish persons or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually "laws of the land," for those purposes. Although in some instances the principle may have been misapplied, yet it seems, in every case in which it hath come into discussion, to be admitted to be a sound one, and the true import of the constitution,"

Statutes that operate Against Principles of Common Right and Common Justice, Are Void.

It is true that universal consent has not been yielded to this proposition, and that it is not without its able opponents; but the doctrine is ably sustained by many of the cases above cited, and in this country, when we observe that one of the announced purposes of the Constitution of the United States is "to establish Justice", it must be held, that any attempt by a State to drag her from her throne, most surely violates the Constitution and is illegal and ineffectual, and this Court is well warranted in saying that "there are limitations on legislative power which grow out of the essential nature of all free government." *Loan Assoc.* v. *Topeka* 87 U. S. 655.

There may be further cited, *Flint River Steamboat Co.* v. *Rob-*

erts, 48 Am. Dec. 178; *Ham* v. *McClaws*, 1 Bay. 93. *Morrison* v. *Barksdale*, 1 Harp. 101. The statute under consideration is a typical one of that sort, applied to and viewed in the light of the present case. If an act providing for the rendering of judgment without notice, is unjust and void, (*Steamboat Co.* v. *Roberts*, *Supra*) one that disposes of private property without judgment and without notice, surely is not just or valid.

THERE WAS NO COMPETENT EVIDENCE OF FORFEITURE.

First, Second, Third, Fourth and Tenth Specifications of error,

A certificate of the auditor is admissible in evidence only for the purposes, and under the conditions, mentioned in the Code, and only by virtue thereof.

Chap, 130, sec. 5, provides as follows:

> The certificate of the auditor of the payment or non-payment at any time of taxes on forfeited or delinquent lands or of their not having been entered on the books of the assessor of the county or counties wherein the same were chargeable with taxes, shall, in any suit in relation to such lands, be prima facie evidence of what is stated in such certificate, provided it be filed with the papers of said suit and notice thereof be given to the opposite party or his attorney at least twenty days before the first day of the term at which it is to be offered as evidence. When the certificate purports to be signed by the said auditor, it may be admitted as evidence without proof of his signature.

A certificate under this provision can be used to prove that taxes have or have not at any time been paid on "*forfeited or delinquent lands*" and the time of such payment, or the fact of "their (such forfeited or delinquent lands) not having been entered on the books" &c—nothing more.

Lands *must be shown* to be "forfeited or delinquent" before the certificate can be used. Such certificate does not testify to the forfeiture or delinquency, it assumes it, and cannot be offered to prove it.

The certificate offered by defendants does not come under this provision at all, nor purport to certify a single thing that the auditor is authorized to certify, and is utterly incompetent to prove, or to be offered in evidence of, a single alleged fact stated in it. It does not purport to say that the lands mentioned in it are "forfeited or delinquent lands" and no evidence that they were, had been offered. The facts stated in it, if true,

would not, as has been shown, have been provable in the case by any evidence and would not constitute forfeiture, if they were proved. If free from all other objections, and admissible for any purpose, it would be but secondary evidence of what should be proved, if at all, by a judgment or decree of forfeiture, or at least by a transcript from the record that is made by statute *prima facie* evidence of forfeiture. No such evidence was offered or its former existence and loss shown.

The statute is in derogation of the common-law, and before a mere *exparte* certificate of a fact, of which, if it exists, there must be other and better evidence, can be used, the certificate must be authorized by the statute. Forfeitures are not to be established by doubtful evidence.

Chapter XXXI, sec. 39, Code of W. Va. provides:

"A record of all real estate so forfeited which shall come to the knowledge of the auditor shall be kept in his office, in which shall be shown the name of some former owner or supposed owner, the quantity or supposed quantity, and local or other description of the real estate, for what years the owner was not charged with taxes, and when the real estate became forfeited. Such record shall be *prima facie* evidence that the owner was not, for such years, charged with the taxes on such real estate, and that he did not cause it to be entered and charged with such taxes as aforesaid, and that the real estate was forfeited and vested in the State at the time specified."

It is from this record that the certificate of the auditor, in proof of the fact that there was no forfeiture, was presented by plaintiff. The certificate offered by defendants is wholly incompetent and inadmissible for any purpose.

The reports of the Commissioner of school land for Wyoming and Logan counties (pp. 16-19,) two only of the four counties in which the land lies, are inadmissible for any purpose whatever. They would be evidence only that such reports had been made, if that were material, but not of the alleged facts contained in them. They are but preliminary to other proceedings, which do not appear to have followed—from which fact the inference may be drawn, if any may, that the lands were not forfeited, or in any way liable to sale. Nothing follows the report of Senter, made a year before this action was brought, and the report of Buskirk, made three and a half years before this suit, terminates with an order made the day the report was filed, that suit be

brought and prosecuted for the sale of the lands reported. These reports do not help the auditor's certificate and are not helped by it. The reports purport to be made under Chap. CV sec. 5 of the Code of West Virginia, which section, so far as it relates to the making of reports, is as follows:

> It shall be the duty of the commissioner of school lands of each county to report to the circuit court of his county, once in each year, a list of all tracts and parcels of land, if any, in whole or in part within his county, not reported to the clerk of the circuit court under sections one and two of this chapter, which in his opinion are liable to be sold for the benefit of the school fund as well as those which have been so reported to said clerk.

The remainder of the section relates to the institution of suit to sell the land.

Sections one and two of said chapter are as follows:

> 1. "All waste and unappropriated lands within the State, and all lands in this State heretofore vested in the State of Virginia by escheat, forfeiture or purchase at sheriff's or collector's sale for delinquent taxes, and not released and exonorated or redeemed within one year according to law; all lands heretofore or hereafter purchased for this state, at a sale thereof for taxes, and not redeemed within one year, according to law; and all lands forfeited to this state for the failure to have the same entered upon the land books of the proper county, and charged with the taxes thereon as provided for by law; shall, so far as the title thereof shall not be vested in junior grantees or claimants under the provisions of the Constitution and laws of this state, be sold for the benefit of the school fund, in the manner hereinafter prescribed. The auditor shall certify to the clerk of the Circuit Court a list of all such lands, which in whole or in part lie in this county, within sixty days after the title thereto shall vest in the state."
>
> 2. "It shall be the duty of the surveyor of each county in this state, as soon as the same shall come to his knowledge, to report to the circuit court all waste and unappropriated lands in his county, except the lands under the bed of the Ohio river, subject to sale under the provisions of this chapter, designating particularly the quantity of the tract or parcel, and the local situation thereo, together with all information he can procure in relation to the same, and of any claim of title thereto."

It will be seen (sec. 5) that what the commissioner is required to report to the clerk of the circuit court is, "a list of *all* tracts and parcels of land *not* reported to the clerk of the circuit court under sections 1 and 2, which in his opinion are liable to be sold." The expression that follows qualifies "liable to be sold" and not the commissioner's duty to report. This is obvious from the uselessness of his reporting things not reported to him or peculiarly in his knowledge, and which had already been reported to the clerk by the state auditor, and county surveyor.

The report of Buskirk (p. 19) embraces a list of lands "that *have* heretofore been reported," for which report there is no authority, and that portion of the report which includes the land in controversy, purports to be "List of said Lands," &c., and not "a list of *all* tracts and parcels of land." It does not appear whether the lands in this list, or any of them, lie in whole or in part in said county, and some tracts appear in both lists. It is at most the "opinion" of the commissioner that the lands are liable to be sold. His opinion will not be seriously urged to be evidence of the fact; and his designation of the lands as forfeited is entirely unauthorized. The commissioner is authorized only to report lands "which in his opinion are liable to be sold for the benefit of the school fund" not reported under sections 1 and 2, and he has no authority to classify them. That is for the court, at some proper time. It involves conclusions which he is not authorized or permitted to make The land mentioned in sections 1 and 2 are such as are waste and unappropriated, or have been forfeited, escheated to, or purchased by, this state or the state of Virginia, and differentiation is certainly not for the commissioner of school lands. He may report any thing that "in his opinion is liable to be sold," but is not authorized or required to describe it as forfeited, escheated or otherwise, and cannot determine its character. Any designation of land by him, as forfeited, is no evidence that it is forfeited.

Neither the reports nor the order of court directing suit to be brought, were made in any proceeding to which either plaintiff or any one under whom he claims, was a party, but said reports and order were of an *exparte* and administrative character. The order is not an adjudication of anything, but is merely a direction to bring suit. The Court has no authority to order the suit to *sell* the land, as it is not shown to be liable to sale, which is a jurisdictional prerequisite in such a special proceeding. Under the Virginia Act of March 30th, 1837, providing for the sale of all lands then forfeited to that state, and for the appointment of commissioners of forfeited and delinquent lands, who were required to ascertain and report to the court all the "forfeited and delinquent" lands of their counties, to be sold by decree of the court, it was held in *Twiggs* v. *Chevallie*, 4 W. Va. 463, that the court had but a limited jurisdiction and "could only adjudicate upon land *actually* forfeited and none other." Until then, the lands in the reports of Buskirk and Senter are shown to be forfeited, the court appears to have been without jurisdiction, and these

reports cannot be used to prove what is necessary to their introduction as evidence. The documents prove nothing, and tend to prove nothing, either by themselves or in connection with the auditor's certificate, except that the defendants felt the certificate proved nothing by itself and needed fortifying. The report of Baskirk puts the land in question in list of lands "forfeited for non-entry for five successive years since 1869," (p. 25) and appears to put the entire tracts in Logan county. There is no forfeiture for "non-entry," as I have shown, and the report of Senter (p. 17) puts the most of it in Virginia and Kentucky, and shows that all taxes were paid prior to and including the year 1883. The want of trustworthiness of these documents is apparent, if nothing else appears. Nothing at all is brought forward from Mingo and McDowell counties, and nothing definitely shows that there is 1000 acres of the land in the state.

It may be objected that this court will not upon writ of error, inquire into the sufficiency of the evidence offered in the court below, but will only examine its admissibility. This I understand to be the general rule, where the verdict is rendered by a jury upon the evidence, but I cannot conceive that it has any proper application to a case where this court reviews not the action of the jury but of the court, and it would certainly seem competent for this court with all the evidence before it, which was before the court below, to determine whether the court below, in directing verdict for either party, was warranted by the evidence in so doing, and exercised proper judicial discretion, and that if this court should be of opinion that such action was not warranted by the evidence, even if properly admitted, it would reverse the judgment.

Plaintiff's title is a "private right and interest in land derived from or under the laws of the state of Virginia * * * and shall remain valid and secure and shall be determined by the laws in force in Virginia prior to the formation of this state of West Virginia.

So declare the very first words of this Article upon forfeiture, and it means that such "private right or interest in land" shall not be confiscated by the state of West Virginia, for a cause or upon occasion for which it could not have been confiscated under the laws of Virginia when the state of West Virginia was formed, or it means nothing at all. It was put as a preface to this

forfeiture Article as a guarantee against the forfeitures to be provided, for Virginia had had no forfeiture laws for years prior to the time of the separation, and never had any like those of West Virginia; and there could be no purpose in putting this saving provision into such a piece of piratical legislation as follows it, unless it was to preserve the interests specified from the general massacre about to follow, if it means nothing, why is it posted over the gate to this temple of despair?

The provision has not received any definite judicial interpretation.

Seventh, Eighth, Eleventh and Twelfth Specifications of Error.

Not only was no evidence of forfeiture shown by defendants, but plaintiff produces explicit evidence to the contrary by proof of payment, by his predecessor in title, of all taxes prior to and including the year 1883, and proof that the land had not since that time been entered in the record of forfeited lands, which the Auditor is required by law to keep, (p. 30), and which is the only evidence of forfeiture, and which is the only evidence, except a proper decree of forfeiture, competent to be offered, if indeed such a decree would be competent. This certificate ought to rebut any *suspicion* of forfeiture that might exist, if the forfeiture law were valid.

In addition to defendant 's failure to prove forfeiture and plaintiff 's evidence to the contrary, it is conceded that plaintiff had no knowledge of the pretended forfeiture or of any facts upon which a forfeiture could be predicated, and no notice thereof, unless the land books were such notice, and that he was a purchaser for value.

At the time of the alleged forfeiture, the title was in Randall, trustee. There is no pretense that plaintiff ever saw the land books and the court below expressed no opinion whether or not they afford *notice*. They certainly do not furnish notice, either of what they do or do not contain, and no competent evidence was furnished upon the trial of what they show. There is no law that makes them notice, and nothing was shown as to whether they were "duly kept" and nothing referred to of any other record that might be notice; and it is in evidence (Auditor's certificate p 30,) that in the place where records of delinquent lands and forfeited lands of every county in the State, brought together in one office, are kept, there was nothing to show any claim

of any kind of the State or of any other person through forfeiture. The law has for years required this record to be kept, and makes it *prima facie* evidence that the lands therein are forfeited, and upon that record and there alone would one look to see if there were any forfeiture of the land, the purchase of which he had in contemplation; and knowing that the clerks of the county courts, who are the custodians and the makers of the land books and of all the county records, are required to report to the auditor all the facts from which the auditor's record of forfeited lands are compiled, such purchaser would rely, and be warranted in relying, upon such record. And the State is clearly bound and estopped to deny the correctness of the record and to claim a forfeiture which that record does not disclose or suggest; and when the State is estopped all the world is estopped.

It will doubtless be contended by defendants in error, that inasmuch as the statute (Chap. XXXI, sec. 39, Code W. Va.) requires only that a record of such forfeited lands as "shall come to the knowledge of the auditor shall be kept by him in his office" &c., a person cannot rely upon that record for information in a contemplated purchase or incumbrance of land, or for any purpose, but is bound by the fact, although, through the fault of the States' agents, no record or other evidence thereof exists. To sustain such contention is to destroy the entire value of a public record, and defeat the purpose of a law, designed for the protection of the investor and the citizen. It would "keep the word of promise to the ear, but break it to the hope." One may well scrutinize the land laws of West Virginia for pitfalls and hidden meaning, but legerdemain of that sort is not to be expected or tolerated. Ample provision is made by law to bring all forfeited lands, if there be such, to the knowledge of the auditor, through the reports of the compilers and custodians of the land books and other public records; and if those officers whose paid and sworn duty it is to inform him, fail to bring the matter before the auditor, how is a stranger to acquire such knowledge, and by what principle of law or equity concerning forfeitures, shall the State take advantage of her own wrong or another be permitted to do so? The contention is puerile.

It may be proper to observe at this point, that, in addition to the fact that a forfeiture must be proven and established under the rule of evidence in criminal cases, when the defense is an outstanding title, that title must be a valid and subsisting one at

the time of trial, and must be proven *beyond all controversy. Greenleaf's Lessee* v. *Birth*, 6 Pet 302; *Leesee of Griffith* v. *Bradshaw*, 4 W. C. C. 171; *Foster* v. *Joice*, 3 W. C. C. 498; *Ryan* v. *U. S.* 136 U. S. 68; *Reusens* v. *Lawson*, 91 Va. 226.

It has been held by the court below that when the sheriff sold a tract of land for taxes and did not *report* the sale within ten days thereafter, as required by law, the owner has a right to assume that no sale had been made, by which his title was divested, and to rest upon his legal rights. *Wakeman* v. *Thompson*, Appendix to 32 W. Va.

Chap. CV, 1, Code of West Virginia given above provides that all waste and unappropriated land, and all land purchased by the State and not redeemed and all forfeited land shall, except such as are invested in junior claimants under the provisions of the Constitution and laws of the State, be sold for the benefit of the School fund by proceedings brought in the Circuit court, and further provides:

> The Auditor shall certify to the Clerk of the Circuit court a list of *all such lands* which in whole or in part lie in his county, *within sixty days after the title thereto shall vest in the State.*

No such report of the land in question has ever been made at any time. The requirement is mandatory and unqualified, and applied to *all* lands, not such as may "come to his knowledge." If the land was forfeited at any time the defendants contend it was, and the law had been complied with, it would have been sold by the State before plaintiff ever heard of it. Can defendants shield their trespass and take shelter under the State by whose fault and by whose officers' negligence, or fraud, plaintiff is brought into his present situation?

If the State had purchased this land from plaintiff's grantor and had failed to record its deed or make any public record of the transaction, and plaintiff had subsequently purchased for value and in good faith, no one will contend that plaintiff would not be protected in his purchase. What force or dignity or inviolability is there about a conveyance by *forfeiture* not possessed by a solemn grant under hand and seal?

Eastern Land & Manufacturing Co. v. *State Board of Education*, 101 N. C. 46 has this to say upon a similar question:

> It will be observed the forfeiture is limited and extends only to his heirs and assigns, it does not embrace the purchasers of the land from them, *bona*

fide. It is not declared that the latter shall forfeit the land for the default of the former, nor that the lands shall be forfeited for such default while the title thereto is in an innocent purchaser, nor can the court *infer* that the legislature so intended * * * . It would be unreasonable and unjust to make the forfeiture apply to the land when and after the title thereto had passed to innocent purchasers.

The agencies of the State failed to comply with the requirements of the statute [to survey or take possession] in apt time, that is, within the time prescribed by law and while the title to the land remained in the grantee and his heirs. As they failed to do so, neither the statute nor the State will allow them, after the lapse of so many years, to disturb the rights of innocent purchasers.

See also *Fletcher* v. *Peck*, 6 Cranch. 122-3-9; *The Banks* v. *Poitiaux*, 3 Rand. 146.

Without conceding that defendants exhibited any competent evidence tending to show that plaintiff's land was forfeited, and proof of forfeiture must be strict and unequivocal, or that the documents received had that tendency, or that such proof could be received in the case: and without yielding to the forfeiture provision a spark of force or validity under any circumstances or for any purpose, it was manifestly error for the court to direct a verdict against plaintiff, an innocent purchaser, no matter what might be the proof or fact of forfeiture.

From the foregoing discussion it is manifest that the instruction of the court below was unauthorized by the facts or the law, and it being admitted that plaintiff had title, except for forfeiture, and that defense failing, the verdict and judgment should have been for the plaintiff.

In the investigation of authorities bearing upon the main question before us, I have found nothing to sustain the position of defendants, and in making this statement I do not overlook *Staats* v. *Board*, 10 Gratt. 400. *Wild* v. *Serpell*, *Id.* 405; *Hale* v. *Branscomb*, *Id.* 418; *Smith* v. *Chapman*, *Id.* 445, upon the Virginia Statute of 1835, and which hold the act to be valid. These cases were all decided practically at the same time and stand as one decision. They are not supported by any principle or authority, or justified by any reason, and none is attempted by the court. They have found few apologists and no defenders except among those who believed in the omnipotence of legislation, and who justify the acquisition of property by power rather than by right.

The legislature had the *power* to enact the statute, and the

court to sustain it, so far as any written limitations upon the power of either were concerned, for there were none, there being no provision in the State constitution at that time, that no person should be deprived of his *property* without due process of law, to restrain them, and the Fourteenth Amendment was not adopted until years later, and the Fifth Amendment had been declared by this Court to be a restriction upon the general government only. *Barron* v. *Baltimore*, 7 Pet. 247; *Lessee of Livingston* v. *Moore*, *Id.* 554.

"But when in the year of grace 1866," as is said by this Court in *Davidson* v. *New Orleans*, *supra*, "there is placed in the Constitution of the United States a declaration that 'no State shall deprive any person of life, liberty or property without due process of law,' can a State make anything due process of law, which, by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation."

But the act that was upheld by these cases was totally different from the one under consideration. It required the land owner to have the land, *then* owned by him, to be entered on the land books and charged with taxes, etc., by a certain designated day, a year and a half distant, and "upon his failure so to do," the lands should, after that day, be forfeited.

The forfeiture was confined to a specific time and was in terms the penalty for the land owner's failure, and was very different from the provision that the land shall be forfeited whenever "the owner shall not have been charged on the land books with State tax on the land" (by the State authorities, that alone have the power). The confiscation in the first case had at least the merit of being confined as to time and specific as to cause; it had no other, nor the above cases in Grattan any authority outside Virginia nor there since 1866, except upon that particular statute, and never were entitled to weight anywhere. The principle involved in them has in effect been repudiated by the same court in later cases. *Boggs* v. *The Commonwealth*, 96 Va.; *Bennett* v. *Hunter*, 18 Gratt. 100.

In noting the requirements for the reports and records to be made and kept of lands alledged to be forfeited, it has not seemed needful to point out the analogies that exist between these and the like records in sales of lands for taxes. They are obvious, and the rule of strict construction and strict conformity ob-

viously applies; but the real evil and infirmity lies deeper than any mere matter of form, or manner of proceedure. The Article itself is essentially, inherently and fundamentally out of harmony with right and justice and the principles that underlie our system of law and government. It is iniquitous in principle and purpose, and can never work anything but wrong and injustice. It accomplishes nothing for the State but scandal, and for the person securing its benefit nothing for which he is entitled to any aid from the law or from the State. It does not contribute to the wealth or welfare of the State, but tends to debauch her citizens and her public officers. If any person's land has in any way escaped taxation, it has not escaped from the taxing jurisdiction, and the Court will deprive the State of no remedy by wiping out this provision; for she can tax the land and sell it or sue for the tax, instead of confiscating the land and squandering it in prodigal distribution; and this fact may not be without its comforting influence, when the question "must be met" as the said court in *Arrowsmith* v. *Burlingim*, "fearlessly but with a sense of responsibility incurred by a judge when he interposes the aegis of the law in defense of a citizen whose property is divested by a legislative act which imputes to him no blame and holds out to him no recompense for his loss."

The forfeiture provision being invalid, because it is a law impairing the obligation of a contract; because it takes private property for other than a public purpose; because it imposes an excessive fine or penalty and inflicts a cruel or unusual punishment without offense; because it invades the province of the judiciary and denounces a legislative sentence; because it takes the property of the citizen without compensation, and without trial, hearing or notice; because it operates against common rights and justice; because it abridges the privileges and immunities of the citizen; because it denies to a citizen the equal protection of the law; and because in these and other ways, it deprives a person of property without due process of law, it should be declared by this Honorable Court to be null and void, and the judgment of the Circuit Court should be reversed.

CONTENTIONS OF DEFENDANTS IN ERROR

It was provided by the stipulation between counsel herein, that briefs should be exchanged before printing, for the purpose of enabling each side to reply, but counsel for defendants in er-

ror were unable, as they tell me, to complete their brief in time for such exchange, and I am therefore obliged to consider what I am advised by them will be their contentions and line of argument upon the main question, as contained in their briefs in other cases of which I have copies.

I shall not weary the court with an analysis of many of the cases that will be cited by them, but it will be found that many of them have but remote, if any, relation to the questions here presented, while others support the contentions of plaintiff in error, and few or none militate against it. Some of the authorities cited in said briefs, and which I am advised will be cited and relied upon by counsel for defendants in error, in this case, I shall notice, so far as extracts therefrom are given, by defendants in error.

UPON DUE PROCESS OF LAW.

Giozza v. *Tiernan* 148 U. S. 657:

"'Due process of law' within the meaning of the 14th Amendment, is when the laws operate *on all alike*, and do not subject the individual to an arbitrary exercise of government."

Bell's Gap R. E. Co. v. *Pennsylvania* 134 U. S. 237–8:

* * * "But clear and hostile discrimination against particular persons and classes, especially such as are of an *unusual character, unknown to the practice of our governments*, might be obnoxious to the constitutional prohibition."

Barbier v. *Connolly*, 113 U. S. 27, 31:

"The Fourteenth Amendment in declaring that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no *arbitrary deprivation* of life or liberty, or *arbitrary spoliation of property*, but that *equal protection and security* should be given to *all* under *like circumstances* in the enjoyment of their personal and civil rights; * * that no greater burdens should be laid upon one than are laid upon others in the *same calling and condition*: and that in the administration of criminal justice, no *different* or *higher punishment* should be imposed upon one, than such as is prescribed to all for like offenses."

Leeper v. *Texas*, 139 U. S. 462.

"The object of section 1 of the Fourteenth Amendment is not to affect the powers of the State, only so far as to take care that no state can deprive *particular persons or classes of persons of equal and impartial justice* under

the law; and that due process is secured by laws operating *on all alike* and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. * *

As to the words from Magna Charta incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the common sense of mankind has at last settled down to this; that they were intended to secure the individual from *arbitrary* exercise of the powers of government unrestrained by the established principles of *private right and distributive justice*"—quoting from *Bank of California* v. *Oakley*.

These principles denying to the state the right of *arbitrary* or *unjust* deprivation of life or liberty or spoliation of property, or the right to discriminate against individuals or classes of persons or property situated similarly to other like individuals or classes, are repeated and reiterated, with little variation of language and no variation of meaning, through numerous cases decided by this court, cited by counsel for defendants in error, and by innumerable others that might be cited. I have made the foregoing extracts from their quotations. I do not know how they will be applied in support of the validity of the provisions of Art. XIII of the West Virginia Constitution.

When a State declares to any person that, if a certain act concerning his property, the performance of which rests solely with the officers of the State, shall remain undone for a given time, neither the beginning or ending of which is fixed, by operation of such declaration his property shall become the property of the State, and he shall have no opportunity to dispute or explain the fact, I cannot bring my mind to regard the act of the State as other than "*arbitrary and unjust*" within the meaning of the foregoing authorities; nor am I helped in the effort, by the consideration that the officers of the State have every inducement, except the promptings of honesty and justice, to bring about the state of things by which they can claim the forfeiture.

When the State declares, that when a tract of one thousand acres shall be found in a given situation, the owner shall, by force of that fact and of the State's declaration, suffer the absolute loss and deprivation thereof, and the same shall become thereby the property of the State or of a stranger; but if a like tract of land, of 999 acres, shall be found in that identical situation, the owner thereof may retain his title, and continue in the undisturbed and unquestioned enjoyment of his land, I am unable to look upon such a law as "operating on all alike" with "equal and impartial justice," and my judgment, that it is a "clear and hostile

discrimination against peculiar persons and classes, especially such as is of an unusual character, unknown to the practice of our government," is not shaken when I learn, as I do from the argument of counsel and some of the adjudications they cite, that this law was enacted largely because the owners of large tracts of land are chiefly non-residents of the State of West Virginia.

And that is true. The larger tracts of land are owned by non-residents, because the portions of the state where such lands lie, are by nature and must forever remain, unsuitable for residence and cultivation and civilized life and are valuable only for their timber and minerals.

Nothing could more clearly and forcibly illustrate the danger and certain viciousness of unlimited legislative power, or power of any kind, intrusted to the state, unrestrained by the Federal Constitution and the Federal Courts. Of this danger Edmund Randolph must have been conscious when, urging the adoption of that Constitution in the Virginia convention, he declared that the Constitution of Virginia had benn violated from 1776 to date, through acts passed by the legislature, whereby contracts, titles and life had become insecure. It is to be regretted that those violations did not cease after the adoption of the Federal Constitution; but it was not until 1866, and the declaration that "no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," that the confederation became a Nation, and wielded anything more than a sword of lath over the heads of recusant sovereignties.

Virginia, up to 1835, led several crusades against lands and landowners, and being beyond the reach of federal control, scourged many of the large tracts of land out of existence; and West Virginia, soon after she got out of swaddling clothes and civil strife and gathered back her law makers from the opposing armies, to which they had respectively lent their aid, opened war upon property rights and began with the land of non-residents that had survived the early carnival of confiscation, a saturnalia of rapine and plunder and a "communism of pelf" that has existed up to the present time, with laws for forfeiture, adverse possession and color of title, the counterpart of which cannot be found in the annals of the law.

The land laws enacted in West Virginia are such as may be expected where one class of people make laws for the govern-

ment of the property of another class. Where the trespasser makes the law by which he shall hold property upon which he has encroached, the laws will be liberal—with the other man's property.

The passion and prejudice of which Chief Justice Marshall in *Fletcher* v. *Peck*, 6 Pet. 137, feared the effect, has been well exemplified in West Virginia. Happily, however, very little land has come within the operation of the forfeiture provision of her constitution.

While the Supreme Court of the State has never held the forfeiture law of West Virginia to be valid, and as I believe, never will, and has not, until lately, been confronted with the question, the court, as previously constituted, has apparently contemplated the early Virginia acts with approval and pleasure, and counsel for defendants in error will doubtless quote with pride, as they have heretofore done, from *McClure* v. *Maitland*, 24 W. Va. 525 this declaration with regard to the scheme of forfeiture:

> The whole history of the system shows a most earnest and determined effort on the part of the legislature, the judiciary, and the people, speaking through our present constitution, to destroy and annihilate the titles of such delinquent owners.

To have these lands placed upon the books by the assessors and taxed and sold, if the taxes were not paid, did not suit the wise and benevolent purposes of the law makers, who didn't want revenue but wanted only to "destroy and annihilate" titles to property and to break up estates.

Exalted purpose, glorious achievement of the legislature, the people and the courts! Proud indeed would we be to hear this related of us by a barbarian traveler at the court of a barbarian despot.—Here is the apotheosis of nihilism!

With pain we hear this said of the judiciary by the judiciary. We can understand the patriotism of legislators, scheming politicians, who are ready to sacrifice other peoples' property to the STATE with one hand while they receive it from the state with the other; but we cannot comprehend how Judges can contemplate such outrage upon the law without righteous indignation.

For the Courts know that forfeiture laws, past and present and especially the present one, besides their other vices, are pregnant with temptation and allurements to bribe and seduce

public officers and corrupt public justice. Wherefore forfeitures are hateful in law and should have no place between the State and the citizen.

"For the bill of rights has particularly declared, that excessive fines ought not be imposed, nor cruel and unusual punishments inflicted (which at a *retrospect to some unprecedented proceedings* in the court of King's Bench, in the reign of king James the second); and the same statute further declares that all grants and promises of fines and forfeitures of particular persons, before conviction, are illegal and void. Now the bill of rights was only declaratory throughout of the old Constitutional law of the land; and accordingly we find it expressly holden, long before, that all such previous grants are void; since thereby many times *undue means and more violent prosecution would be used for private lucre than the quiet and just proceedings of law would permit.*" Bl. Com. IV. 379.

Among the means by which it is charged in the preamble to the constitution adopted by "the delegates and representatives of the good people of Virginia in convention assembled" on the 29th day of June, 1776, that George the Third, "previously intrusted with the exercise of the Kingly office in the government of Virginia, had endeavored to pervert the same into a *detestable* and *unsupportable tyranny*" and which led the good people of Virginia to declare such government under the Crown of Great Britian to be "*totally dissolved*," was, "by inciting insurrections of our fellow subjects with the allurements of forfeiture and confiscation." (Va. Code 1849 p. 33).

With these illustrious examples before us, it is not to be comprehended how such forfeiture as we have been considering could meet the approval of any but the ones directly and personally benefitted by it.

Human nature is the same in all ages but Avarice often outruns Justice and Wisdom. The people of Virginia, who had suffered from confiscation and forfeiture, resorted to them as temporary expedients, by laws that operated for a day and expired of their own limitation. The legislature made and could unmake them. The people of West Virginia, who had profited by confiscation, sought to leave a heritage of injustice and oppression to future generations, beyond the reach of legislative mutations, and put the edict of spoliation into their constitution, their supreme law, like carrion thrown into a spring to pollute its perpetual flow.

But they forgot that there was a Federal Constitution—the sleepless guardian of Justice and the Law.

Besides the laudable and benignant purpose of "annihilating and destroying" titles to land that has been ascribed to the forfeiture laws of Virginia, and by implication to the Article of the Constitution of West Virginia under consideration, counsel for defendants in error will cite and quote from *Holly River Coal C.* v. *Howell*, 36 W. Va. 304, thus:

"It cannot be doubted that the policy of the legislature in various acts concerning delinquent lands was not only to secure the Commonwealth her just dues but also (and in the main) to quiet titles in the western part of the state, and to remove the check to population and to the settlement and improvement of the country which their unsettled condition served to create. The policy of the law was to convey a good title under these sales as far as the commonwealth had the means of so doing. * * *"

The fact that West Virginia is not only the most sparcely settled state east of the Mississippi river and still leads the world in land litigation, testifies how well the *policy* of promoting population "by the allurements of forfeiture and confiscation" and of quieting titles without the intervention of the courts, has succeeded.

"To secure the commonwealth her just dues," instead of enforcing a tax upon the land, the land is taken from the owner and given to another; to promote settlement of the country the land is given to one who may already be in possession; and to quiet titles a controversy is created where none existed before. In view of these facts one is inclined to wonder if it would not have been as well if the state had promoted her policy by providing "for a judicial trial to establish the guilt of the accused," and the fact upon which the forfeitures were claimed, as is suggested in *Wong Wing* v. *United States*.

Hagar v. *Reclamation, Dist.* 111 U. S. 707.

By due process is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law. It must be adopted to the end to be attained and whenever it is necessary to the protection of the parties, it must give them an opportunity to be heard respecting the judgment to be sought. The clause in question means therefore that there can be no proceeding against life, liberty or property, which may result in the deprivation of either without the observance of those general rules eslablished in our system of jurisprudence for security of private rights.

In the West Virginia forfeiture law what "forms of law" are followed? If the object of the law is punishment, it certainly

is "adapted to that end" it cannot fail—but it gives no opportunity to be heard. If the object of the law is revenue, is the process (?) appropriate to the case, which, instead of charging and collecting a *tax* either confiscates the *land* or bestows it upon another without price? Is it "just to the parties to be affected" that because *the State has failed to charge the taxes*, it should take the land—without any proceeding therefor?

"Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and opportunity to be heard; so also where title or possessson of property is involved." This paragraph is quoted in *Lent* v. *Tillson*, 140 U. S. cited in same brief.

This takes the legs from under the contention of defendants in error, for what but title is involved in the forfeiture? Counsel for defendants in error have heretofore, at times, laid great stress upon the fact that the forfeiture provision deals only with the *title* and that the person divested could have his "due process" when, his title being gone, proceedings should be had to expell him from possession.

Such a proposition is to charge the Fourteenth Amendment and this Court with Punic faith, for if a man can be deprived of his title *without* due process, it will be easy afterwards to deprive him of the unlawful possession, by due process. When this court, in the above case, said that the provisions of the Fourteenth Amendment are an additional security to the like provisions in the constitutions of the several states, "against the arbitrary deprivation of life and liberty, and the arbitrary spoliation of property, that neither can be taken without due process of law," it meant, that that guarranty should apply to property of every kind. It did not mean to give the protection of the law to the incident, the shadow, and withhold it from the substance.

I know not what the gentlemen conceive to come within the term, "arbitrary spoliation of property"; but if the absolute and final assumption by the State of the title of the citizen to his land, to make a largess of it to a trespasser, for no violation of any law, and for no delinquency of which he is accused; for no act or omission that can deprive or delay the State of any right or remedy against him or his property; without notice of such assumption of his property; and without opportunity or right of redemption;—if this does

not fit the words, "arbitrary spoliation of property" it will be hard to exemplify their meaning.

United States v. *Repentigny*, 5 Wall, 211.

This was a proper case of forfeiture, such as I have spoken of at page 21 *et seq.* hereof. Here was a feudal tenure, a conditional estate and condition broken. Rather than remain in the country after its conquest, and give allegiance to, and hold under, a new sovereign, the tenant had fled the land and realm; and the United States, the successor to the paramount title, the lord paramount, had entered after breach of condition and resumed the actual possession of the fief.

And this court "agrees that before the forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or in the language of the common-law, office found or its equivalent." The legislative act that was held to be such equivalent, was an act directed at a particular tract of land, passed *after* the breach of the condition of the fief, and directing the resumption of the possession of the land, the title already being in the United States. The Act of Congress was not the cause, the beginning and the end of the forfeiture; the cause of the forfeiture was prior to and independent of the act. That case has not the remotest resemblance to the one at bar.

THE FORFEITURE AS AN ABANDONMENT.

Counsel for defendants in error, will contend, unless they have been convinced of the folly of it, that "the failure of the owner to have his land entered on the land books" is "equivalent" to a declaration of abandonment of the land by the owner, a declaration that it isn't his, that he doesn't want it, that the State or any one else can have it, &c.; and that the provision of the constitution is, in substance and effect, a declaration by the State, that the owner of the land has abandoned it, and doesn't want it, and has dedicated it to the State and all others who may care for it.

To what declaration of the owner the *failure of the State to tax the land* or its dropping it from the land books *after he has had it entered*, which only is the cause of forfeiture, is equivalent, I have not heard stated.

"Abandonment includes both the intention to abandon and

the external act by which the intention to abandon is carried into effect." Am. & Eng. Enc. Law.

To constitute an abandonment there must be the concurrence of the intention to abandon and an actual relinquishment of the property. *Judson* v. *Malloy*, 40 Cal. 299. Intent is the essence of abandonment, and it can not be contended in seriousness, that the legislature can supply an intent that does not exist in fact, and make an abandonment of property that the claimant is endeavoring to hold and of which he is in actual use and enjoyment; for the forfeiture provisions make no distinction between vacant lands and those that are held in the fullest use and occupancy.

"Oh! but," say the counsel, "the Article deals only with the title and not with the possession," and imply, if they do not assert, that the *land* and not the title—the ownership, is "property." They do their intelligence injustice. I will only refer them to *Wynehamer* v. *The People*, 13 N. Y. 378. Their plea that it is the *title* that is abandoned, surrenders the whole contention, for there is no such thing known to the law as loss of a perfect fee simple title to land, by abandonment. Equities, easements, inchoate titles and rights and such like, may be surrendered and abandoned. Possession, which pretains to the land, may be abandoned, but the title, which inheres in the owner, if it be complete and perfect, cannot be shaken off like a garment. It has long since been established that the leopard can "change his spots" at will, by leaving one spot and going to another; but it remains true that "the Ethiope cannot change his skin."

Mr. Washburn has investigated the subject of abandonment and the authorities upon it and announces the result as follows :

"It is probably not too strong a conclusion to assert that in no case can a man lose his title to a freehold in land by any act or oral declaration of abandonment, unless it comes within the catagory of estoppel, or is followed by such a possession by the person claiming title thereto in his stead as brings the case within the statute of limitations. It was with a view to this conclusion that several of the cases above mentioned have been cited, to show that it was not the abandonment by the original owner in favor of another that gave the title, but the possession by the latter being continued the requisite length of time to allow the statute of limitations to take effect." (Washburn on Real Prop. Vol. III, p. 66-67.) The position here taken is further sustained by *Davenport* v. *Turpin*, 43 Cal. 597;

Smyles v. *Hastings*, 22 N. Y. 217; *School Dist.* v. *Benson*, 31 Me 385. Tiedeman on Real Prop. Sec. 739.

"Nevertheless," they say, "it is within the legislative power by enactment operating *in futuro*, to say that a failure to enter the land shall be evidence of intent to abandon it."

Nevertheless, I say, that has not been done or attempted, nor could such failure be made *conclusive* evidence, both for the reason, as is shown, there can not be an abandonment of a complete title, and because the State cannot accomplish by indirection what she cannot do directly. If the Constitution had attempted it, that would have been a different case, but having the use of the entire English language, the authors of the Article could as well have declared that such act should be an abandonment, as to make the declaration they have made. Instead, however, of attaching any significance or effect to the failure of the owner to "have his land entered," they chose to declare, in words that need and permit no farfetched and fanciful translation, that "when * * * the owner shall not have been charged on such land books with state tax on the land, then, by operation hereof, the title shall be forfeited,"—not abandoned nor anything else, but just *absolutely forfeited* and vested in some other person. The Constitution does not employ any euphemism, and if counsel for defendants in error are ashamed of the word "forfeiture," they have betrayed no delicacy about retaining possession of plaintiff's land by virtue of it.

FORFEITURE AS A LIMITATION LAW.

Equally strained and ineffectual is the effort of defendants in error to find an analogy between the forfeiture and the statute of limitations, or to make of the forfeiture provision a limitation law. This would also have been easy for the authors of the law to do, but they seem to have been satisfied to make it simply a forfeiture—there were limitation laws already. But they argue, or have argued, "The law is therefore that the title of the individual may, by adverse possession of another individual, be transferred to that other without any hearing or process of any suit."

That is not the law. The title is not transferred. The power to assert it against the adverse holder is gone, but the title of such adverse holder is a different one. There is no privity of estate, but hostility between them.

The Article in question purports in express terms, of itself, "by operation" of itself, to take the title out of one person and put it into another. It is not by the act of the one divested nor of the one invested, (except it be the State) that the title is "transferred", but it is by the act or operation of the law. No limitation law ever attempted to do this, nor would it be valid if it should attempt it.

The statute of limitations does not pay the debt, but presumes from lapse of time that it has been paid, if a debt existed, and will not let the creditor wait till all evidence of payment may have been lost, before enforcing his demand. In real actions the defendant is in possession of the land, claiming title and exercising all the rights and acts of ownership openly and against the world, and when this is done for a sufficient period of time, it is assumed that his deed or grant gives a better title than that of the demandant, and presumes the grant itself if need be. Demandant's title is not transferred to defendant, who has a better one, and is not taken from him by law. The law leaves the parties where it finds them—where the demandant has so long left the occupant of the land, and will not help him get the possession. If this is depriving one of his property, "without due process of law," as the gentlemen contend, I fail to see how the fact justifies the Article in question, or the taking by it.

Apropos of this subject what the court had to say in *Arrowsmith* v. *Burlingim*, 4 McLean 494 is of interest.

"Is the defendant protected by the statute of 1838-9 'to quiet possession and confirm titles to land? The defendant contends that it is in effect a limitation law. If not, that it is within the competency of the legislature to act upon the right in this matter so as to divest it. So much of said act as is material to this controversy, is as follows, viz.

'Every person in the actual possession of lands and tenements under claim and color of title made in good faith, who shall for seven successful years continue in such possession and shall also during said time pay all taxes legally assessed on such lands and tenements, shall be held and adjudged to be the legal owner of said lands and tenements to the extent and according to the purport of his or her paper title.'

Is it a limitation law? It does not profess to be one either in its title or body. But it is said at the bar, that limitation laws have their origin as to real action on the assumption of abandonment. No adjudged case or dictum in support of it has been shown and none is believed to exist, but abundant authorities can be shown to the contrary. See Blackstone's Com. 188 and following pages. That position is dismissed with the remark, that it is more ingenious than solid.

It is then a legislative conveyance and adjudication of one man's land to another. * * * Can legislatures in this enlightened age,

with written constitutions to restrain them, take from one and give to another his property, with or without compensation? It is only necessary to state the proposition in its nakedness to meet refutation."

State Usage as Due Process.

Counsel for defendants in error will contend, that whatever was the usage of a State, prior to the adoption of the Fourteenth Amendment, becomes and remains "the law of the land" thereafter; and they will endeavor to sustain Article XIII upon the statutes and adjudication of Virginia prior to the diremption of that State and the creation of West Virginia.

Without going into a discussion of the general proposition, but only noting my dissent from it in so broad and sweeping terms as they will propound it, it will be found not only that the doctrine has no application to this case but that it is not supported by anything found in the laws or adjudications of Virginia.

It is not to be believed that it was intended by Congress when it proposed, or by the States, when they adopted the Fourteenth Amendment, that the provision of any temporary statute or of any special proceeding however extraordinary, however at variance with the common law or the customary course of law, however repugnant to right, justice and the fundamental principles of free government, that may have found temporary countenance in any state, under conditions peculiar to the time, should thenceforth, for all time and for all purposes, be taken out of the operation of the Federal Constitution; but howsoever that be, the provision of the Article XIII, was not in the law of West Virginia when the Amendment was adopted, was not and never had been the law of Virginia, or so far as I know, of any country on the face of the earth, and there had been nothing in the laws of Virginia in any way resembling it, for some thirty years prior to the adoption of the Amendment. Nor have the principles of forfeiture statutes like those of Virginia been recognized and approved as "due process of law" in this country, but, as the many adjudications herein cited show, they have been rejected and denounced by the courts throughout the land.

It is not necessary, however interesting it might be, to go into an extended examination of those statutes, but a brief reference to them is in order.

An act passed December 13, 1792, provided that if taxes on

any tract of land remained unpaid for three years, the land should be forfeited; but the literal purpose of the act was defeated by the court in *Henning* v. *Bererly*, cited at page 50 hereof.

An act passed December 19, 1796, provided that no lands should be deemed forfeited for non-payment of taxes, unless returns and notices required by law were made and given.

By acts passed from 1803 to 1810 lands were made forfeitable for non-payment of taxes from two to three years, but the owner was given from one to three years to redeem by paying back taxes.

In 1810, it coming to notice of the general assembly that certain persons had omitted to enter their lands on the books of the commissioners of the revenue, an act was passed February 5th of that year whereby the lands of persons failing to enter them upon the commissioners' books of the proper county *within eighteen months* after the passage of that act, should be forfeited. The lands were to be sold and the proceeds paid into the public treasury.

This was the first attempt made to forfeit land except for non-payment of taxes assessed.

By successive acts passed from time to time up to 1814, the time within which to enter lands was extended, and February 9th, 1814, the act was repealed and all forfeitures remitted. The act was of no practical importance. No other act for the forfeiture of lands, except for non payment of delinquent taxes, was passed for twenty-five years, and the time of redemption of lands, so forfeited, was extended from time to time up to 1834.

The act of February 27th, 1835, was the next and only act but one, after 1810, for the forfeiture of lands for failure of the owners to list them for taxation and pay the taxes. This act, among other things, and after reciting that it was known to the general assembly, that certain large tracts of land west of the Allegheny mountains never had been, or for years past had not been, entered upon the books of the commissioners of the revenue, whereby no forfeiture for non-payment of taxes had occurred or could occur, and the settlement of the country was retarded, provided as follows:

2. "Be it, therefore, further enacted, That each and every owner or proprietor of any such tract or parcel of land shall, on or before the first day of July, eighteen hundred and thirty six, enter or cause to be entered, on the books of the commissioners of the revenue for the county wherein any

such tract or parcel of land may lie, all such lands now owned or claimed by him, her or them through title derived mediately or immediately under grants from the commonwealth, and have the same charged with all the taxes and damages in arrear, or properly chargeable thereon, and shall also actually pay and satisfy all such taxes and damages which would not have been relinquished and exonorated by the second section of the act concerning delinquent and forfeited lands, passed March tenth, eighteen hundred and thirty-two, had they been returned for their delinquency prior to the passage of that act; and upon their failure so to do, all such lands or parcels thereof not now in actual possession of such owner or proprietor by himself or his tenant in possession, shall become forfeited to the commonwealth, after the first day of July, eighteen hundred and thirty-six, except only as hereinafter excepted."

Section "3" vested the forfeited title in such actual occupants of the forfeited land as they should have *bona fide* legal or equitable title to, derived from a grant from the State since April 1st, 1831, and upon which they had paid all taxes charged and chargeable.

This act is the only one of the kind of any general importance that was ever passed, the operation of the earlier one being postponed by subsequent acts until about the time of its repeal, when all forfeitures under it released.

It will be seen that the Act of 1835, has few points of resemblance to Article XIII of the Constitution of West Virginia.

It dealt only with the lands which *at that time* were not on the commissioners books, and made no requirements of the owner for the future, nor provision for future omissions; and for good reason, because, as I have shown in the early part of this argument, to be the case at the present time, when the lands were once entered on the books, they would be taken care of by the public officers, who, there being no forfeiture provided in case of future omissions, had nothing to tempt them to drop the lands off. If the lands were put on the book by the specified time, they would remain there, and if they were not put on the books, they were swept back into the public domain, where, as they should be disposed of, they would go upon the land books through the regular channels. And so by the single stroke the field was cleared, and the lands put on the books or put where they would certainly go on them.

The Act, instead of relating to "any five successive years" or other sliding period of time, made the date of reckoning definite—July 1st, 1836.

If, however, the land owner failed to comply with the requirements of the act, lands occupied by him or his tenant were

not forfeited. The act was particularly aimed at unoccupied lands, the property of non-resident proprietors. Later there being some doubt whether certain lands exonorated from forfeiture for non-payment of taxes, by a previous act, were embraced within the operation of the Act of 1835, an Act was passed April 12th, 1852, providing, that if any such lands were still off the land books, they should be entered thereon and the back taxes paid by the owner, in default of which such of said lands as were not occupied by the owner or his tenant should be forfeited after July 1st, 1853. This Act was an unimportant one in effect. (For digest of the foregoing acts, see Hutchinson's Land Titles, p. 5, et seq.).

This was the end of forfeiture laws in Virginia.

It will be seen, that while the provision of the West Virginia Constitution, adopted in 1872, operates in terms from 1869 to the end of time, the Virginia acts did not operate *in futuro* except to fix a definite date when the penalty should attach, but applied only to lands that, at the time the acts were passed, were not on the tax books. They related to the present, operated in the present, and expired by their own limitation. They were in precise terms, penalties for the owner's "failure so to do" and affected all tracts of land, irrespective of size. The Article of the West Virginia Constitution operates *in futuro*, has no limitation of existence, but flows on with the current of time, applies to no definite point of time or period of time, discriminates between tracts of land on account of size, and puts upon the land owner punishment for the sins of the assessor or other state officer.

Nothing can be said for the validity of the Virginia acts except by contract with the West Virginia provision.

And so I say, that when the Fourteenth Amendment was adopted in 1866, there was no forfeiture law in West Virginia, and had never been; there was no forfeiture law in Virginia and there had not been for many years, and there had never been in Virginia any law resembling that of West Virginia; and the Virginia statutes, and the adjudications that declare their validity, that cannot be sustained upon legal principle or authority, nor justified upon grounds of legitimate policy, furnish no valid precedent for the forfeiture provision before us, nor support to those who assert its validity. As I have previously said, when those acts were pronounced valid by the Courts of Virginia, the Fourteenth Amendment had not been adopted, and there

was nothing in the Constitution of the United States to restrain the legislature in the matter, as the Virginia bill of rights provided merely, "that no man be deprived of his liberty, except by the law of the land or the judgment of his peers." "Liberty" may embrace life but not property. If the legislature saw fit to violate the principles of Magna Charta, which was but the Common law in Virginia, it had the power to do it, perhaps, and if the courts of the State sustained the act, howsoever erroneously, there was no help for it. Those statutes determined the titles to the lands upon which they operated. Where they destroyed them they ceased to be, and where they created them they have come down to us.

The statutes were but legislative judgments. They effect the land forfeited by them and no other and constitute no rule of law or of proceedure, any more than does any other sporadic outrage of law or morals. The courts of West Virginia have had only to *apply* these statutes, they could not *adjudicate* upon their *validity or invalidity*, for that was settled and the question barred before West Virginia was formed; and whatever has been said by the West Virginia court, in support of their validity, it was bound to say, because it was *res adjudicata*; but these sayings do not apply, and should not be applied, to any other act, similar or dissimilar.

Only the Act of 1835 was of any operation or consequence. It was passed, effected its purpose, and expired thirty years before the Fourteenth Amendment and thirty-six years before the West Virginia Constitution. It was never the law of the land in Virginia—certainly not after its expiration in 1836, and certainly not when the Amendment was adopted and when West Virginia was created. It furnishes no support for the doctrine of State usage as due process of law, put forth by defendants in error.

Counsel for defendants in error will cite *Armstrong* v. *Morrill*, 14 Wall, 109, and insist that this court has sustained the Act of 1835. The decision does not do so.

There was no question in that case over the validity of the Act. Both parties treated it as valid and the court was not called upon to pass judgment upon its validity, but treated it as the parties did, without question, simply saying that the land became forfeited, &c., by virtue of the said Act, "as construed by the Supreme Court, or Court of Appeals of the State." Indeed

the court was bound to treat the Act as valid, for at that time, 1835, as we have shown, the legislature of Virginia was supreme and the Federal courts were without authority to question a state law for want of "due process."

The case of *Bennet* v. *Hunter* and other cases tried and reported together, 18 Gratt. 100, and which were affirmed by this court, 9 Wall, 326, cited at p. 52 hereof, strip the earlier cases of all their authority upon the general principles involved in them.

That case holds that:

> **Congress has not the power to impose the penalty of forfeiture of lands for the non payment of taxes assessed thereon. Congress has all the powers for enforcing the collection of its taxes that were in use by the Crown of England, or that were in use by the States at the time of the adoption of the Constitution of the United States; but forfeiture of the land assessed with the tax was not then in use, either in England or the States, as a mode of collecting the tax.**
>
> **If the forfeiture provision of this act is to be regarded as absolute and as a penalty upon persons engaged in rebellion against the United States; then it is a legislative conviction and punishment without trial, of all who fail to pay the tax and is a violation of the provision of the constitution which forbids Congress to pass bills of attainder.**

Apply this to the case at bar; forfeiture of lands for non-assessment of land "was not in use" in Virginia or West Virginia at the time of the adoption of the Fourteenth Amendment.

If the forfeiture of lands provided by the laws of West Virginia is to be regarded as absolute and as a penalty upon persons whose lands are not assessed with taxes, then it is a legislative conviction and punishment without trial, of all whose lands are not assessed, and is a violation of the constitution which forbids any State to pass a bill of attainder.

The Virginia forfeiture Acts, like the West Virginia law, were confiscations, pure and simple, and so far as their purpose was to "settle the country and quiet titles," they and the adjudications sustaining them, were as destitute of the reasons supposed to justify them, as they were abhorrent to law and justice, and they failed of their purpose, for the titles were quiet until the State undertook to divest and distribute them, and the settlement of the country, if it was not retarded, was not promoted, by the despotic power assumed by the State, and the disturbance and insecurity necessarily following. People have not been attracted to either state "by the allurements of forfeiture and con-

fiscation," and land titles have been thrown, by the acts of both States, into a confusion from which they have not yet emerged and never will emerge, until the sins done to the Constitution of West Virginia "are burned and purged away."

Virginia, impoverished by the Revolutionary struggle, in order to realize something from the wilderness west of the Alegheny mountains, offered her land and sold it in large bodies, because there was little demand for small tracts, to many persons, who, like Robert Morris and the State and by the same cause impoverished, hoped also to restore their fortunes out of the western lands, then a *terra incognita*. Later, the State, attributing to her former policy of making large grants the tardy settlement of the country, which was properly attributable to the uninhabitable character of the land, endeavored by her laws, as some of the courts have thought, to encourage settlement by breaking up, by every possible means, these large estates. The cause of the sparce settlement of the portion of Virginia and West Virginia principally concerned by the forfeiture laws, has been wholly misunderstood, for no fact is better known than, that no settler was ever, to the present day, deterred by the large grants, but every acre of land fit for cultivation, and thousands of acres that are not, were taken up and settled under junior grants, before the formation of West Virginia, and without the slightest reference to, or regard for, the large grants or their owners. If there had been more land that would sustain life, the large grants would have suffered worse.

When the world demanded of West Virginia her coal, and built railroads to it, there came a possibility of permanent and substantial development, and with it there comes embarrasment, not from the existence of the few large grants that have survived the law and the settler, but from the infamous systems of land laws and forfeiture laws that have grown up out of unholy endeavors to "destroy and annihilate titles," instead of leaving them to the operation of ordinary taxation and reasonable statutes of limitation.

Reed v. *Dingess*, 60 Fed Rep. 21, will be cited for defendants in error, as sustaining the contention of defendants and upholding the validity of the forfeiture laws, but it distinctly does not do so; it discusses the question and leaves it, the case turning upon other points.

Some observations of the learned judge there are, tending to

excuse such forfeiture laws. He suggests that: "When the state bids in land it obtains a tax title, and it is a matter of common knowledge that owing to irregularities of one kind and another, tax titles are seldom perfect." A title that is good enough for the private purchaser, ought to be good enough for the State; but the State may provide for a collection of the tax by suit and judgment and judicial sale of the land, which would obviate the objection. Continuing, he says: "Laws like these of the Virginias strike at the root of both of these difficulties" (void tax titles and omission of the land). "They forfeit the land upon the failure of the owner to have himself charged upon the proper books for taxation." [Note the misapprhension of the terms of the law] "and vest title immediately in the State; thereby avoiding all questions of validity of title, which might otherwise arise upon possible irregularities in assessment and on proceedings previous to or at the sale."

Far be it from me to criticise not the *opinion* but the *dictum* of the learned judge, but I am moved to observe that in criminal proceedings if we would straightway hang the person charged with crime, we would avoid all danger of a hung jury, and all questions that might arise upon the possible innocence of the accused.

"If" says the learned judge, "such legislation can be sustained, it is more effectual than other common modes of collecting real estate taxes."

It would seem, though, that while, "*if it can be sustained*" they may "collect" the *land*, it is wholly ineffectual to collect any *tax*.

And commenting on the demand of the plaintiff in the case for some judicial proceedings before title shall be divested the court declares:

> "We know of no reason why a forfeiture of title to land for sufficient cause, by statute or constitutional legislation, is not by 'due process of law'. It certainly is not that arbitrary exercise of the powers of government which Magna Charta intended to prevent when it declared that no person should be deprived of life, liberty or property except by the judgment of his peers or the law of the land."

"For sufficient cause" must be accepted as a most important qualification, but even with that we may be permitted to hold to the view that for *no cause whatever*, can a forfeiture be at once created, completed and declared by legislative act.

It is some matter of regret, that in this connection the learned judge did not take occasion to suggest some example of what would be "that arbitrary exercise of the powers of government which Magna Charta intended to prevent."

"The objection seems to be" says the court "not to the right of a State to provide by legislation that a certain act or omission shall work a forfeiture or incur a penalty. All penal legislation does that. It is to declaring the forfeiture complete by the act, without any legal proceedure. But, if the act, in every case of its commission, involves the forfeiture, nothing remains but to ascertain the fact of its commission, and that can as well be done in a subsequent suit involving the title as by a proceeding brought by the State to inforce the forfeitures."

If this be the true rule, then it should apply "to all penal legislation", and all criminal offenses can be tried collaterally by civil proceedings, and upon the rule of evidence in civil cases and without complaint first being made. "But if the act, in every case of its commission involves" the penalty, we may dispense with the court and manage to do with the legislature and the sheriff.

I think it will appear by reference to the authorities hereinbefore cited at page 49 *et seq.*, and especially from *Wynchamer* v. *The People* (52) *Irvin* v. *Lumbermens Bank* (70) *Marshall* v. *McDaniel*, (72), that this dictum of the learned judge is not sustained by the weight of authority and certainly not by principle.

The court suggests that the objection of counsel "is not to the right of the State to provide by legislation that a certain act or omission shall work a forfeiture, but to declaring that the forfeiture shall be complete by such act without any subsequent legal proceeding." That may be true in that case, but I have endeavored to make as emphatic as possible the contention of this plaintiff in error, that not only a forfeiture for whatever cause cannot be adjudged collaterally, cannot be proven as here attempted, and cannot be made complete by the legislative act that provides for forfeiture *in futuro*, but that, so long as the Constitution of the United States and the principles of Magna Charta endure, the State is without power in any or all of its departments of government, without proceedings of any sort, or by them, to confiscate under the name of a forfeiture or any other name, the land of a citizen, to be retained by the State or to be bestowed upon a private person, when or because the State has failed to tax it, or because the owner is not, for any reason whatever, taxed for it. To state this proposition in its

nakedness is to command the assent of all who understand the genius of our government, To admit that a State has such power is to assert that the Federal Constitution is a jugglery with words, and that we hold our lives, our liberty and our property at the mere will of a few peddling politicians and upon such terms as their caprice may prescribe; for if the State has such power, then we can, without offense or cause, be attainted, exiled, outlawed, imprisoned and executed and our estates annihilated by an act of the legislature without the aid, and in spite of the protection, of the courts. But none of these things can be done under the Constitution.

THE FORFEITURE AS A TAX LAW.

Counsel for defendants in error will insist that this forfeiture provision is a tax law or revenue law, and will cite many authorities to show that by reason of the urgent demand of the State for her taxes, she cannot abide "the law's delay" and may resort to summary proceedings, and that in matters concerning the levying and enforcement of taxes that due process of law requisite in all other proceedings, is dispensed with. This is an admission that there is a want of such due process as is required in other cases, and is a surrender of the case, if this is not a tax law.

No one will contend that an adjudication of court is necessary to the validity of a tax or assessment, although some of the States have adopted that course, nor do I deny the right of the State to proceed summarily in the levying and collection of taxes; but "summarily" is not equivalent to "arbitrarily," nor does it involve the right to ignore or override the rights of property.

The urgent necessity that demands arbitrary proceedings and such as deprive citizens of substantial rights and opportunity to assert them, never exist in the levying and collection of taxes; and that necessity which will warrant even a millitary commander, in time of war, in taking private property without the consent of the owner, for the preservation of the army and the defense of the country, must be actual and immediately pressing, and then the owner is entitled to compensation. *Holmes* v. *Sheridan*, 1 Dill., 351; *Mitchell* v. *Harmon*, 13 How., 115; *Grant* v. *U. S.*, 1 Ct. of Cl. 41.

The customary proceeding for the levying and collecting of

taxes, to be found in almost every state and country, affording notice of every important step, and opportunity for the citizen to be heard in the matter if he desires, and extending usually over a period of six months or more, measures the urgency of the State in the matter of taxation.

The State of West Virginia could, at any time, through her officers, if in no haste about the matter, enter any tract of land upon the land books, assess the taxes, sell the land, if need be, and collect the tax in six months; but being in "urgent need" of revenue, shewaits five years for the land owner to have his land taxed, and if it is not done, no matter for what reason, or under what circumstances, the State refuses to receive the taxes from the owner, but appropriates the land, and so much of it as is not gratuitously bestowed upon private trespassers, is sold by the commissioner of school lands to himself and his friends for the cost of crying it off—to the end that the State gets neither the tax nor the land. And this, counsel for defendants in error will urge, is "sanctioned by long and general usage and consecrated by time." Eternity could not consecrate such confiscation.

Such plea of necessity is pitiful and the Constitution, Art. I, 3, says it should not be sustained:

> "The provisions of the Constitution of the United States and of the State are operative alike in a period of war as in time of peace, and any departure therefrom or violation thereof, under the plea of necessity, or any other plea, is subversive of good government and tends to anarchy and despotism."

If counsel for defendants in error class this as a tax proceeding, let us see how it meets some of the requirements of the law of taxation.

Some of the well established principles of taxation are, that the tax must be for a public purpose; that taxation must be uniform upon the same class of subjects, uniform, of course, as well in the enforcement as in the levying; that at some stage of the proceedings the owner shall have notice of the assessment or of the proposed enforcement of the tax. These at least and some others are essential, and a tax levied without regard to them, the law attempting to authorize it, and the proceeding to enforce it, would be alike void.

Treating the provision before us as a tax law, all these are wanting; the law operates on tracts of land of a thousand acres or more and does not affect similar lands of a less quantity;

there is no notice or provision for notice, no proceeding of any kind before or after; the land is taken from one person and given to another gratis; and most remarkable of all, for a "tax law" or "revenue law," there is no revenue and no tax.

The enforcement of a tax is the most important part of the whole proceeding, and the character of the taxation, as to its being for a public or a private purpose, is most certainly determined by the final destination of the proceeds. In the case before us we see that the land becomes the property of a private person, and the public gets nothing. The agency and the machinery of the State are operated to a private end and between private persons, and as was said by the Court in *Concord R. R. Co.* v. *Greeley*, 17 N. H., 57:

"Even if the Legislature should declare that an act taking the property of A. and giving it to B. as his private property, was an application of it to public uses, no one would contend that such a declaration made that public, which in its nature and its object was private."

It is said in *Bertholf* v. *O'Riley*, 74 N. Y., 515:

"The comprehensive scope of the guarantee of private property finds many illustrations in judicial decisions in our State. The limit placed upon the power of taxation is an instance. The right of taxation is an attribute of sovereignty, without which governments would be powerless, and organized society could not exist, and it is said to be unlimited. But this is only true when it is exercised for a public purpose. The taking of *private property* for a *private purpose*, under the guise of taxation, is not less a violation of the Constitution, than if the property of A was attempted to be transferred to B, by the mere force of a legislative mandate."

This court has had something to say that is applicable at this point, and said it thus:

"To lay with one hand the power of the government on the property of the citizens and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and called taxation. This is not legislation. It is a decree under legislative forms. Nor is it taxation." *Loan Association* v. *Topeka*, 20 Wall. 664.

Nor is the Article in question either legislation or taxation. As a tax law it would be void from every point of view; but nothing can be more far fetched and preposterous than the attempt to classify this as a tax law, or as having any connection with taxation or revenue. The very root and essence of the forfeiture is that *no taxes had been charged*. It is not a provision for

assessing and collecting a tax, but for taking away the land from the owner and giving it to someone else, when no tax is levied on it.

The test of a revenue law should be the raising or attempting to raise revenue; but by this provision the State, instead of taxing and selling the land, and getting revenue out of it, hands it over to a bystander, or in default of such, takes it herself. Land upon which taxes have been paid for three-quarters of a century, becomes a gratuity to a tresspasser who has paid taxes for five years.

The proposition that it is a tax law would come with better grace from counsel for defendants in error, if there had not been a very different character and purpose vehemently ascribed to it by them, by whom it is declared to be a declaration by the State of an "abandonment by the owner;" "a limitation law" against him; an act "for the settlement of land titles in the Western part of the State of West Virginia;" an act "to destroy and annihilate land titles,"—unusual ends, surely, to be attained or aimed at, by a "harmless, necessary" tax law.

If titles are to be annihilated or even "settled," why not leave the matter to be accomplished by due process of law through the courts of justice?

The authors of this provision do not seem to have regarded it as having anything to do with revenue, for instead of including it in article entitled "Taxation and Finance", they put it in a seperate article appropriately entitled "*Land Titles.*"

Concerning Payment of Taxes.

Counsel for defendants in error will not fail to bewail the depravity of persons "who do not pay their taxes," though by what right they cast the first stone, it will not appear; and it may not be unsuitable to observe in this connection, that there is, upon occasion, vastly too much mock sentiment wasted about the payment or non payment of taxes. No one questions that taxation is necessary to the maintainance of government, no one denies that the payment of taxes is a duty of the citizen and of the owner of property within the taxing jurisdiction, however good or bad the laws may be and however well or badl administered; but no one is unaware that they are not voluntarily contributed but are *exacted* by *law*, made a lien upon property, paid reluctantly, and (pity 'tis, 'tis true) sometimes evaded.

It is not conceivable however that they should be intentionally and deliberately evaded when to save the tax is to lose the land. War, rebellion, and revolution have resulted from the imposition and collection of taxes, and all laws and all courts recognize that tax proceedings are *in invitum*. Men yield eagerly their blood and their lives to their country, but they resist the assessor and surrender taxes only when compelled. It is an infirmity of human nature, inherited from oppressed ancestors, which the law recognizes and indulges.

Strict construction of tax laws and strict conformity by public officers are always required and every provision is construed, every doubt resolved, in favor of the person or property taxed; and this indulgence can well be extended to the owner of land, for he cannot hide the land nor dodge the tax, if the officers of the state care to subject either to the payment. The man who promptly discharges taxes charged against his property is to be admired and appreciated, and the man who pays taxes upon the land of another under a void pretense of title, for the purpose and in the hope of acquiring the land, is entitled to all that a valid law strictly construed and strictly pursued will give him, —he has no equities. If he fails in his purpose to acquire the land of another, for nothing, he is not to be regarded as a martyr, and if he succeeds, he is not to be canonized for patriotic payment of taxes.

NOTICE TO THE LAND OWNER.

Counsel for defendants in error will cite authorities that hold that in certain assessment and taxing proceedings no notice is required because it cannot change the rights or liabilities of the party, or the course of the proceeding or the result of it; and they will argue from those cases to this, to which the doctrine is not applicable, that the land owner must take cognizance of the law; that if he has not entered his land upon the land books, he knows it, and knows that it will be forfeited in five years, and when that time is up he knows that the land is forfeited and gone, and what good would notice do him, and what would it tell him that he did not already know?

It may be argued with equal force that the taxpayer whose land is on the assessment books, knows, or ought to, that if he does not pay his taxes, the land will be sold, that if he has not paid them he knows it and need not be told it, and that when

the land is about to be sold he knows that, too, and it would be an unwelcome attention to notify him of it; but a law that made no provision for any notice in such case would not stand a moment before any court in America.

But the argument proceeds upon a false basis. No time is fixed by law when the landowner shall do any of the things required of him, nor manner prescribed wherein they shall be done. It does not appear from the law when the five years began or will begin to run—except from 1869, or when it will expire, and it does not appear that the land owner has any means of knowing; he certainly has no notice, and it is perceivable that he may have no knowledge, that his land is not on the land books and taxes charged. But that is not the important matter. When he has had his land entered upon the land books and charged with the taxes for years, and has paid them, how is he to know that the officers have *ceased or failed to charge the taxes*, which alone works a forfeiture, or know *when* they ceased charging them? He is not required or permitted to charge the taxes himself, so that it is not a matter necessarily in his own knowledge, but is a matter very likely to be kept from his knowledge. I can conceive of few things in the affairs of men about which there is greater room for innocent ignorance or mistake, than about each and all these matters, and nothing which by every rule of right, reason and *law*, more imperatively demands *notice* before so grave a consequence attaches as the confiscation of not less than one thousand acres of land, or of one foot of land.

It is argued, too, that when all this is done, there is no need for any inquiry or proceeding about it, for the land owner cannot by any possibility change the result, and so notice and hearing would do him no good. That is not for the statute to determine. It is enough that he is denied the right, whatever might be the result of his defense. The matter of notice should not be belittled however little we may think it may avail.

Notice is the first law of nature, from the hiss of the serpent to mutterings that foretell the wrath of Jove. Summons and opportunity to defend life, liberty and property, the trinity of human law and effort, are not the invention of counsel for plaintiff in error nor of legislatures or courts; there is authority higher and more ancient, which we may not dispute. It is the Voice of the Lord God in the garden: "Adam! where art thou? *

Hast thou eaten of the tree whereof I commanded thee that thou shouldest not eat?" Then followed the plea and the judgment of forfeiture (the estate was *conditional*) made matter of record.

"What good did notice to Adam do him? What did the Omnicient learn that He did not know before? What good of it all?" say counsel for defendants in error.

"And the Scribes and the Pharisees brought unto him a woman taken in adultery and set her in the midst," saying, "Moses in the law commanded us that such should be stoned; but what sayest thou? * * He said unto her: Woman, * hath no man condemned thee?" She said "No man, Lord."

She was not brought for *trial* but for *punishment* and not having been first *condemned* she was discharged.

Here indeed is law "sanctified by usage and consecrated by time."

"Then spake Jesus unto them again saying: 'I am the light of the world, he that followeth me shall not walk in darkness.'"

ACQUIESCENCE.

It will be contended by counsel for defendants in error, as I am advised, that the forfeiture provision in question has been so long and so generally acquiesced in that, whatever its legal infirmity, it has become a rule of property, which this court will not now overturn. This plea is upon a par with the one against disturbing the holders of void titles. Defendants have failed to furnish the court with any evidence to sustain the point and none exists. The adjudications of the West Virginia courts have been almost wholly upon Virginia statutes, that they could not lawfully question. Those acts were not of continuing or recurrent operation, they were of a day and did their work in a day although the readjustment and the clearing up of the debris occupied much time. The people did not acquiesce, they were forced to submit by adjudications that were final, but which can not be extended to other acts.

The provision in question has but recently come before the State or Federal Courts for decision, and it is in the nature of the case, that it could not have reached many tracts of land, for land owners would ordinarily be able to keep their lands out of its operation. And referring to the long list of lands reported by the Commissioner of School Lands, (p. 20 *et seq.* of record) which the court will not consider, the statement may be indulged

without going *far* out of the record, that most of those tracts were forfeited under the Act of 1835, and the remainder not at all.

There has been no such acquiesence in the provisions of this Article as becomes "persuasive of its validity," to use the strongest expression I find employed by the courts upon the question; and this court will not be governed in its opinion of the constitutional validity of a law, by the reluctance or inability of any person to discharge the highest duty of citizenship, lawful resistance to invalid laws, and promptly demand his rights under the constitution from the highest courts of the land. I combat the proposition, that I can be bound to the operation of an invalid and outrageous act, by the submission of another, or that any acquiesence however general or long continued will warrant this Court in upholding legislation that is clearly prohibited to a State, and deny to any citizen a constitutional right. The Constitution says *no State shall* do the things prohibited, and it makes no proviso that a State may do them under any conditions, and it attaches no period of limitation to the citizen or "any person" to resist and demand his right. But if there were anything in the doctrine advanced for defendants in error, the facts do not come within the operation of the rule they contend for, and there is no evidence in the record. It may, however, be interesting to observe that such consideration, which we will presume was pressed upon the Court, did not influence the decisions in some of the cases cited herein. The time for which the statutes that were declared invalid in those cases, had been "acquiesced" in for the following periods of years.

Kinney v. *Beverly*, 2 Heu. & Minn. 318, 16 years.

Wilkinson v. *Leland*, 2 Pet. 657, 37 years.

State v. *Heeman*, 70 Mo. 441, 14 years.

Eastern L. L. & M. Co. v. *State Board*, 101 N C., 46 years.

Marshall v. *McDaniel*, 12 Bush. 378, 51 years; although the court had formerly given a partial approval to the act. Other cases that I have not examined in this respect would doubtless show similar result.

It is not thought that this proposition of counsel for defendants in error, which proceeds upon the assumption that the Article is invalid, can have any weight with the Court.

OVERTURNING OF TITLE.

I am advised that it will be urged by counsel that to declare the forfeiture laws invalid would upset the title to a vast number of estates, upon which "thousands of homes have been builded representing years of toil and privation by the citizens and actual settlers." The court will decide this cause upon the law and the evidence in this case, without reference to consequences upon other persons; but it will be a comfort to know that the situation pictured by counsel does not exist in fact, and that comparatively few claims of title in the state rest upon a *West Virginia* forfeiture, and of those few, every one is unholy to the last degree and ought to perish. They are gratuities if not frauds, and in most cases both. Nearly all the large grants of the last century, except the lands of the "Swan Estate," of which the grant in question is a part, and a few others which have regularly been charged with taxes, were swept away by the Acts of Virginia of 1835 and were irredeemably gone before West Virginia was founded, and exist now only *sub vacua imagine formae.* The law, invalid as it unquestionably was, was upheld by the Virginia courts, and there was then and probably is now, no authority elsewhere to call it in question, and for the titles that it destroyed there is no resurrection; but the lands that survived have been put on the land books and titles are now lawfully held under the original grants. There probably is not in the State of West Virginia a title resting on the West Virgina forfeiture laws, not protected by she statute of limitation, that has a trace of equity in it. It is not perceived how there would be in the annulment of this law, danger to the just claims of the "actual settler" whose "years of toil and privation" have been spent in the improvement of his land, under any fair application of the statute of limitations and the doctrine of adverse possession, without going to the extent the courts have gone, and embracing all the circumjacent land that can be described in a void deed and tacking it to an original holding. There is nothing behind this scare crow, but if it be a choice whether one shall surrender that which he has unlawfully acquired, or for his benefit, another shall be despoiled of what is lawfully his own, the quicker this forfeiture law is declared null the better. No just claim can be injured, and the State at least, cannot be the loser, for there is nothing to prevent the collection by suit of any taxes

that should have been charged and paid, if any, or the charging of back taxes and collection by sale of the land.

If it is objected that the State or the officers may not know that the land has not been but ought to be, entered and taxed, it is replied that they have at least as ample means of knowing or ascertaining that fact as they have of ascertaining that the land is forfeited for want of such taxation.

There may well be said of this Article as was said by the Court in *Arrowsmith* v. *Burlingim*, 4 McLean, 497-8:

"The act is so fraught with disaster to the country in the insecurity of property that this court must assume that the legislature was not aware of a tithe of the evils they were entailing on the country, if this law were sustained. The principle embraced and put forward in the law is at war with freedom. For the man is a slave whose property is unsafe.

"This act presents a strong anamoly. If the plaintiff had committed a crime causing forfeiture, his property could not be taken from him but upon a judicial decision; but for no imputed fault it is taken from him without trial by this act. * * * The United States sold their lands for a full price and gave a grant in fee simple unconditionally. It is under a grant of this kind that the plaintiff claims. * * * In this case the State of Illinois gives without price that which is not hers, but a citizen's.

"'No person shall be disseized of his freehold, &c., unless by the judgment of his peers or the law of the land.' This is only declaratory of first principles. The only value of it is to restrict the government to a particular mode of divesting the title. 'The judgment of his peers or the law of the land.' The authorities agree that this must be done through the courts."

If the Article of which we complain is not within the prohibition and control of the Federal Constitution, and the courts can afford no protection against such despotism, then we may exclaim with the court in *Vanhorn's Lessee* v. *Dorrance*, 2 Dal. 314:

"Shame to American legislation! That in England, a limited monarchy, where there is no written constitution, where Parliament is omnipotent and can mould the Constitution at pleasure, a more sacred regard should have been paid to property than in America, surrounded as we are with a blaze of political illumin-

ation; where legislatures are limited; where we have republican governments, and written constitutions by which the protection and enjoyment of property are rendered inviolable."

The statute books of modern civilized countries may be searched in vain for a parallel to the forfeiture laws of West Virginia. For injustice and despotism they stand unequaled. They are the fruitful source of more fraud, extortion and imposition than the absence of all law could be. Officers trump up the charge that land is forfeited for want of assessment in the name of a certain person, when the land has been charged with taxes in the name of subsequent grantees and owners, and the taxes regularly paid for years, a suit is brought in the name of the State, the land sold, the record covered by void claims of title, and the land with a swarm of trespassers, with resulting suits to remove clouds, as in *Cook* v. *Lasher*, 74 Fed. Rep. 701; *Lasher* v. *McCreary*, 66 Fed. Rep. 834. Owners whose lands have regularly been charged to them and taxes paid, can be made parties to a suit to sell, as forfeited, an overlapping tract or the same tract or part of it claimed adversely or alleged to be forfeited in the name of a former owner, as in cases now pending in the Circuit Court, and be cut out by a decree entered upon service by publication and of which they never heard. From two or more persons the State receives its taxes and the land is forfeited because not charged to still another. Endless confusion and uncertainty concerning titles, which must always depend upon matters *dehors* the record and *dehors* the land itself, and endless mischief to land owners and scandal to West Virginia titles results and will result as long as these forfeiture laws are suspected to have any validity.

This Court has never been, nor will it ever be, wanting in patience to scrutinize every claim of the citizen and every assertion of power by government, nor wanting in courage to repress Congress or a State in every attempt to encroach upon the sacred rights of the individual citizen, whether the interest involved be small or great. Happily legislative transgression of constitutional authority is not frequent, but as said Chief Justice Ruffin in *Hoke* v. *Henderson*, *supra*:

"When unfortunately, such instances do occur, the preservation of the integrity of the constitution is confided by the People as a sacred deposit, to the Judiciary. In the discharge of that duty, the approbation of the legislature itself is to be anticipated; for the principle of virtue which restrains

them from a known and willful violation of it, will induce them to rejoice at the rescue of the constitution from their own incautious and involuntary infraction of it."

In the Judiciary, and especially the Federal Judiciary, is the last refuge, the last sanctuary of right and justice and of the Law. Here is the shield and the flaming sword. Not everything in the form of legislative enactment, not everything that masquerades in the guise of constitutional provision, is law, when measured by the eternal principles that underlie our government, and that our courts and judges are sworn to uphold; and the Judiciary can be sure of the approbation and the gratitude of the Legislature and the people, when by its courageous discrimination the spurious is detected and the law preserved from invasion or contamination.

It is earnestly protested that the verdict and judgment rendered and entered by direction of the court in this cause in said Circuit Court, are erroneous upon each and every of the grounds and for all the reasons herein pointed out; and plaintiff having established his right to recover the land mentioned in his declaration, and defendants having offered no valid defense thereto, plaintiff in error respectfully prays this Honorable Court to reverse said judgment and remand said cause to said Circuit Court with directions to set aside said judgment and verdict and enter judgment for plaintiff therein; or that such proceedings be had therein as may be proper in the law. And this cause is hereupon, on behalf of plaintiff in error, respectfully submitted for decision.

MAYNARD F. STILES,
COUNSEL FOR PLAINTIFF IN ERROR.

See Appendix next page

APPENDIX.

After completing the foregoing, and at the last hour before filing the same, I have hastily inspected in the clerk's office the brief for defendants in error, and I crave the patience of the court and pause a moment to notice briefly a few matters therein.

At page 3 counsel for defendants in error say:

"In the trial of the cause it was developed in the evidence that neither King, the plaintiff, nor any of his predecessors in title had ever listed the land in question for taxation, nor had it entered on the books of the commissioner of the revenue for assessment and taxation.

"But it did appear that in 1883 there was a pretended redemption of it in the county of Wyoming, when Robert E. Randall owned it. * * * The land had never been entered on the land books, assessed, or taxed since the formation of the State, in 1863."

This is indeed a most remarkable statement. The record is perhaps the best evidence of what was "developed on the trial," and it will be seen therefrom that defendants offered no evidence upon the question of entry and taxation except from 1883 forward. Auditor's certificate (p. 14), the reports of the commissioners of school land, and order of court thereon (pp. 13, 16, 19). Defendants in error discuss no other evidence. Plaintiff proved payment of all taxes prior to and including the year 1883 (p. 30).

Concerning the "pretended redemption," this court need not take the statement of counsel, for that matter is found in McLure *vs.* Mauperture, 29 W. Va., 636, and will show how regardless of facts is the statement of the gentlemen. The redemption by Randall was from a *tax sale* to the State, and Mr. Chilton, of counsel for defendants in error, was counsel for Randall in that case in the Wyoming county court.

There is no objection to counsel discrediting himself if he desires and to his going out of the record to do so, but he will hardly be accorded the right, now that he is upon the opposite side of the case from the successor of Randall, to impugn the character or effect of the redemption.

According to the statement of that case, 200,000 acres of the land had been sold for taxes in the name of Randall for the year 1870, and 300,000 acres in the name of Mauperture for the years 1874, 1875, 1877. This of necessity involves the fact that the land *was entered on the land books and charged with taxes*, and that the taxes for all previous years *had been paid.* The law presumes that, and counsel for defendants in error know the fact.

The land was sold for taxes, and, not being redeemed within a year, was esteemed to be irredeemable—forfeited—and the commissioner of school lands, under a law then in force, brought suit to sell it out in 640-acre tracts, and with the characteristic recklessness of a commissioner of school lands had the taxes computed back to 1839, the year after the passage of the act mentioned by counsel for defendants in error, whereby a trust was created in Dumas for the estate of Colonel Swan, although the taxes had been paid in Virginia and in West Virginia to the time of sale; which facts being shown after the appearance of Randall, the taxes were adjusted accordingly by the court and paid into court by Randall. At the same time, as appears from the case, the Pittsburg National Bank of Commerce (whose title was afterwards united with the Randall title in King's grantor) claimed 365,000 acres of the land and had paid the taxes on the same, and conceiving that the proceeding would adjudge the question of title, became party to the suit to contest Randall's right to redeem. The lower court decided in favor of Randall, and the bank appealed. The court of appeals, carrying out the policy of the State to exact the taxes on a tract of land from as many persons as have or claim title to it, recommended that the bank would also redeem, as the proceeding did not settle title.

I quote the following from the statement of the case:

"The commissioner's report [the case had been referred to a special commissioner] that the taxes on this land in Logan county were pretty regularly paid, but for the taxes of 1879 it was returned delinquent and sold and bought for the State, the purchase-money being $903.32, which, with interest at 12 per cent. per annum, amounted to $1,224.58. The commissioner also reports that he has good reason to believe that this has been paid to the commissioner of school lands of Logan county, but he cannot report it as so." [It is apparently not easy to trace money when it gets into the hands of that official.] "He reports that the land in Logan county charged as 100,000 acres was sold for taxes in the name of the Pittsburg National Bank of Commerce in 1881, the amount of the taxes being $2,338.20, and was redeemed by the bank; that the amount of taxes on the land for 1882 not paid in Logan county was $475.00."

In view of these facts and the evidence in the record of this cause, the said statement of counsel for defendants is incomprehensible. Double taxes were paid, according to McLure *vs.* Mauperture, up to 1882, for when the land was entered, whenever that was, taxes were charged back to 1863, and paid.

The final order of redemption, set out in full in the statement, contains this provision: "And it is ordered that the clerk certify a copy of this order to the auditor, and also certify, under the direction of said Randall or his attorney, a copy of this order to the assessor of the proper assessment district for taxation."

Here was a specific direction to the clerk to certify the order to the auditor without regard to Randall or his attorney, and the direction to certify to the assessors is also mandatory, Randall or his attorney supervising the matter.

By reference to sections 15, 17, 23, chapter XXIX, of the Code, given at pages 17 and 18 of this brief, it will be seen that it was the duty of the clerk to certify the order to the auditor and to the clerk of the county court, who makes out the land books, independently of this order, and

for the auditor to certify the redemption to the clerk of the county court, and the clerk duly to enter the land on the land books in the name of the redemptioner, for taxation. Why didn't these officers do these things, if they did not? No fault could be charged to the attorney of Randall, now attorney of defendants, except as to the copy to be sent the assessor, and that would not relieve the clerk. If the copy was sent to the auditor, it would get to the assessor through him and the clerk of the county court. If any fault is charged to the attorney, I refer to the supposed case, at page 68 hereof.

At page 9 of brief for defendants in error counsel say: "By an act of April 12, 1852, the same policy was recognized and acted upon by the legislature."

That act was, as I have shown (p. 106), an appendix to the act of 1838, the only act of any effect of the kind. Nothing was forfeited by the act of 1852, so far as known, and it was only directed at certain lands and was not a general act. "This legislation," they say at same page, "continued to be the policy of the State of Virginia until the formation of the State of West Virginia."

This statement has nothing to sustain it. A single act, not of continuing operation, cannot establish a State policy. The act of 1835 exploded July 1, 1836, and killed everything within reach, and was inoperative thereafter. It was not repealed, because it was dead, and its like was never re-enacted in Virginia, and it was not until thirty-four years later that anything like it was enacted in West Virginia, and in the meantime the Fourteenth Amendment was adopted.

The provision of the constitution of 1863, referred to by counsel for defendants in error at page 10, does not bear upon the question, for it does not purport to forfeit anything for any cause, but merely directs the legislature to provide for the *sale* of waste and unappropriated land and land "forfeited to the State of Virginia" for non-payment of taxes and non-entry "for the year 1831 or any year previous thereto, under the laws of the State of Virginia."

When the Fourteenth Amendment was adopted Virginia

had not had a law forfeiting land for any cause but non-payment of taxes assessed, for thirty years, or, counting the act of 1852, for fourteen years, and West Virginia had had none at all. With what force, then, can it be said either that such laws, and especially the present Article, the like of which never existed, were at the time of the adoption of the Fourteenth Amendment the settled policy of either State, or that they were necessary to the administration of the affairs of the State? It is an outrage and an insult to assert that confiscation is a necessity of a State for any purpose. West Virginia got on without such laws from the time of her organization and for years before; but after the close of the war, when half the State was unreconstructed and disorganized; when the amusement of the people of the mountain portions consisted in burning court-houses and indiscriminate murder, with preference for strangers who were rash enough to come among them to claim lands, and the restoration of order was beyond the practical power of either the State or the Federal Government; when the non-resident dared not attempt the assertion of title to his lands and could not attend to the payment of taxes—conditions that have continued but slightly modified ever since—then the opportunity came for one man to steal the land of another under cover and color of a confiscation by the State, and the act of 1868 was passed (p. 10 of brief for defendants in error). It is doubtful what it means, but it doesn't matter; it was after the adoption of the Fourteenth Amendment and is prohibited by it and cannot aid "State usage"—the first act of the kind for a third of a century.

Wakeman vs. Thompson (20):

Judge Jackson says: "I am not inclined at this time to question the soundness of that decision."

It was not necessary, for the tax title was defeated on other grounds. The decision referred to relating to the act of 1831, it is hardly to be thought that it was open to question. This has no bearing upon the matter before us.

Reed vs. Dingess (p. 21):

Counsel quote from the syllabus: "Lands were forfeited for failure to enter the same for taxation. Const. W. Va., art. 13, sec. 6."

The purpose of counsel is to give the impression that the court so decided, which it did not; and it may bear repeating that the validity of the West Virginia forfeiture law has never been affirmed by the circuit court, except so far as to give the instruction complained of in this case, nor in the court of appeals of the State, but two cases are now pending there for argument this month (January). The use of this brief has been requested by counsel therein.

Hawkins vs. Barney (p. 21):

This case is so placed as to mislead. It belongs with what precedes and not with what follows.

Lasher vs. McCreary (p. 23):

Here, again, there is no ruling upon the validity of the law. The land had escaped taxation but one year. The facts did not bring the case within the law, valid or invalid.

If Judge Jackson took the view of Article XIII that the counsel wish to imply, he would have given this instruction asked by defendants upon the first trial of this cause and would have taken the case from the jury.

At page 51 counsel for defendants in error suggest that after land is forfeited the owner can bring the fact to the attention of the commissioner of school lands and compel him to bring a suit against the land, and that in such suit the owner can redeem the land. The counsel are mistaken about this. The land-owner has never been conceded to have any power over the commissioner of school lands, nor any interest in the land. The commissioner does not bring the suit, and in a case like the present Buskirk, being a claimant of the land and one of the defendants in the action, would hardly be expected to facilitate a redemption.

But there is one feature that counsel throughout their argument have carefully avoided, and that is the provision which is the whole gist, object, and purpose of the Article, that when land has not been taxed for five years it

thereupon becomes vested, not in the State, but in a lot of intruders. The provision was not and never would be made for any other purpose than for such people to get the land. No one would commit such an outrage upon the law for the benefit of the State. When suit is brought it relates only to the land that is not vested in such claimants. (See sec. 1, page 83 hereof.) In almost any case there would be little or nothing to be redeemed, the land all being transferred to other claimants; but if all this were as the counsel suggest, it would not help Article XIII, for these provisions are not in that article and did not exist when it was adopted, and it makes and contemplates no redemption, but distinctly contemplates that there can be none. The article cannot be made valid by subsequent acts of the legislature. It must work out its own salvation or perish.

It is not true, as stated by the counsel (p. 52), that "these tribunals and the times of their sittings * * * are all provided by law," whatever tribunals are referred to. Suit is not brought unless ordered by the court, and then summons is issued as in other cases; so that the rule stated on page 52, as to notice by statute, does not apply. Article XIII, which is all the court below based its action and instruction upon, contains no notice and provides no notice of anything, and it must do so to be valid. (Fisher *vs.* McGur, 1 Gray, 1; Hibbard *vs.* The People, 4 Mich., 125; Wong Wing *vs.* U. S., 163 U. S., 228; Boggs *vs.* Commonwealth, 76 Va., 989.)

The counsel say (p. 57):

"The State has no ready means of knowing the names and residences of the owners of title."

The statement is absurd. I have set forth the law at pages 16-20, showing how the State has provided the most complete and ready means of knowing every incident in the ownership of land from the time it is granted through every vicissitude and mutation. The land books, properly kept, are a complete history of the title to every tract of land, and the means of keeping land on the books is exemplified in the Rendall decree of redemption lately spoken of.